VIA HAND DELIVERY

December 7, 1998

EX PARTE OR LATE FILED

Ms. Magalie Roman Salas
Secretary, Federal Communication Commission
445 12th Street, N.W.
Washington, DC 20554

Re: Ex Parte Presentation of Covad Communications Company in CC Dkcket No. 98-147, *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability,*

Dear Ms. Salas,

On December 7, 1998, Dhruv Khanna, Susan Jin Davis, James D. Earl, and Thomas M. Koutsky of Covad Communications Company ("Covad") met with Larry Strickling, Chief, FCC Common Carrier Bureau to discuss issues related to Covad's comments filed in the Commission's CC Docket 98-147, including Covad's December 7, 1998 *ex parte* letter to Chairman William E. Kennard in CC Docket No. 98-147.

Two copies of this Notice are being submitted to the Secretary of the FCC in accordance with Section 1.206(a)(2) of the Commission's rules.

Sincerely,

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cc: Larry Strickling, Chief, FCC Common Carrier Bureau

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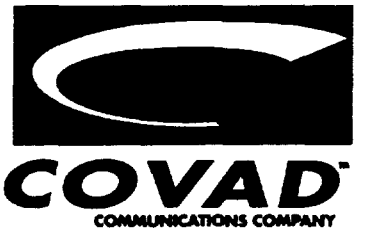

December 7, 1998

The Honorable William E. Kennard
Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, DC 20554

Re: *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket No. 98-147

Dear Chairman Kennard,

Covad Communications Company ("Covad") is writing this letter to draw the Commission's attention to several recent decisions that further demonstrate and support the Commission's initiative to reform the existing physical collocation and loop unbundling rules as proposed in the *Advanced Wireline Services* docket.[1] Covad strongly supports the Commission's proposals to promulgate rules regarding alternative physical collocation methods, including cageless physical collocation, and the Commission's prescient proposals regarding the unbundling of loops capable of supporting advanced services.

It is easy for incumbent LECs to present lobbying materials to this Commission, meretriciously asserting what they "have done," or what they "will do" if they receive their desired regulatory outcome. The Commission has heard similar stories before. But what is important is what is actually happening in the trenches—a reality vividly demonstrated in the attached decisions. These decisions show the delaying tactics used by incumbent LECs, both at the operational and regulatory levels. These decisions also show the fruits of labor-intensive efforts of several State commissions and their staffs who are working to ensure the development of a competitive broadband market that the Commission can spread throughout the nation. Most importantly, these decisions show that what stands between American consumers and widespread availability of broadband services like DSL are the actions—not the words or promises—of incumbent LECs.

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[1] Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, CC Docket No. 98-147, FCC 98-188 (rel. Aug. 7, 1998).

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1. Arbitration Panel Rules that SBC's Collocation Practices Violate Dictates of Good Faith (Attachment 1).

On November 24, 1998, an American Arbitration Association panel, convened in San Francisco, released an Interim Order in an arbitration instituted by Covad against Pacific Bell ("Pacific"), SBC's California subsidiary.[2] Covad instituted this arbitration pursuant to a mandatory AAA arbitration clause in its interconnection agreement with Pacific Bell, based upon Pacific Bell's breach of its contractual obligations and blatant violations of the Telecommunications Act of 1996 with regard to its physical collocation, unbundled loop, and unbundled transport obligations. The arbitration panel found that SBC, through Pacific Bell, repeatedly breached its interconnection agreement and that its conduct did not measure up to its obligations of good faith and fair dealing (Attachment 1, ¶ 10).

The Opinion clearly demonstrates—relying on documentary evidence subject to the scrutiny of cross-examination—that SBC has not faithfully implemented the Act and that SBC's promises and assurances of future compliance should be viewed with great skepticism. In particular, the panel made the following findings—

- "Pacific did not act in good faith in its assessment of collocation space available for Covad." (Attachment 1, ¶ 11).
- Pacific did not obtain the required determinations from the California Public Utility Commission when it rejected Covad's physical collocation applications on account of space limitations (Attachment 1, ¶ 9). Section 251(c)(6) of the Communications Act requires all incumbent LECs to obtain these determinations.
- The panel found that Pacific's rejection of Covad's physical collocation application for a critical Silicon Valley central office—Menlo Park 11—violated the dictates of good faith performance.[3] The arbitration panel found that it was "demonstrated unequivocably that Menlo Park 11 had ample space for several cages" (Attachment 1, ¶ 14). Even with this victory, even now Covad will not be able to provide its broadband services to residents of that residential community for several additional months—solely because of Pacific's breach.
- The panel stated that "Menlo Park 11 is not an isolated incident" and found that "Pacific has breached its obligation of good faith performance in a more fundamental and pervasive way" by making "reassurances" to Covad about its

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[2] *In re the Arbitration of Covad Communications Company and Pacific Bell*, Case No. 74 Y181 0313 98, Interim Opinion with Respect to Covad's Claims for Breach of the Interconnection Agreement and Injunction (Am. Arbit. Ass'n. Nov. 24, 1998) (Attachment 1).

[3] Covad applied for collocation in Menlo Park 11 more than one year ago—but only after the Covad was able to inspect this office as part of the arbitration proceeding did Pacific finally admit that space for physical collocation was available in that facility.

future performance that "were patently unfounded." The panel also found that Pacific's unilateral rejection of alternative collocation methods "exacerbated the harm to Covad from Pacific's non-performance." (Attachment 1, ¶ 17).

- The panel also decided that while Pacific had collocation space guidelines, those guidelines "have been followed inconsistently or not at all" (Attachment 1, ¶ 15). The proceeding also uncovered internal Pacific documents that demonstrate Pacific's disregard for its obligations and the Act. In particular, one document (quoted in Attachment 1, ¶ 15) reveals what appears to be utter disregard of the Commission's collocation and space reservation rules (47 C.F.R. § 51.323) in rejecting an application for physical collocation.
- The panel also found that Pacific had rejected Covad's proposals to resolve ordering problems related to DSL loops without offering any workable alternative (Attachment 1, ¶ 19).

The Opinion makes it clear that reform of existing collocation processes and methods by incumbent LECs is critically necessary. The panel observed:

> Pacific remains the sole arbiter of whether physical collocation space is available in a particular CO. There is no mechanism for Covad to test Pacific's decisions and to be assured that it will be afforded space, according to priority of application, where space is available. . . . On the record here, that is not a tolerable situation.

Attachment 1, ¶ 27. As Covad detailed in its comments in this proceeding, similar problems exist throughout the nation.[4] The Commission has the power to remedy this intolerable situation by reforming the collocation rules as it proposed in the *Notice*.

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[4] Indeed, other incumbent LECs appear to use space reservation "policies" to keep out competitors. For example, in its Miami-Palmetto central office, BellSouth claims that there is no space for physical collocation while it continues to reserve 4,293.5 square feet of space in that office for "future use." That reservation of space totals up to *17.6%* of the entire floor space of the office. In addition, floor diagrams reveal that some current uses of space in the Miami-Palmetto office are 686 square feet for a conference room and lounge and 876 square feet of administrative space. *See* BellSouth Telecommunications, Inc.'s Petition for Waiver for the Miami Palmetto Central Office (Fla. P.S.C. filed July 27, 1998). BellSouth has taken a similar stance in other offices, including West Palm Beach Gardens, where it is reserving over 15% of the that 20,314 square foot office for "future use." BellSouth Telecommunications, Inc.'s Petition for Waiver of the West Palm Beach Gardens Central Office (Fla. P.S.C. filed Aug. 7, 1998). In both of those offices, BellSouth is now rejecting physical collocation applications for a mere 100 square feet.

2. *New York P.S.C. Orders Cageless Physical Collocation (Attachment 2).*

The second document is a recent decision by the New York State Public Service Commission that orders Bell Atlantic to provide a form of cageless physical collocation proposed by Covad.[5] Covad's proposal, called "identified space collocation" in the NYPSC Order, permits collocators to install and maintain their own equipment in single-bay increments in non-caged, already-conditioned floor space in the central office.

In opposing Covad's proposal, Bell Atlantic did not dispute the feasibility of the option but instead trotted out the same tired network security arguments that ILECs have used in the *Advanced Services Proceeding*. However, when the issue was referred to a collaborative session (supervised by NYPSC Administrative Law Judge Jaclyn A. Brilling and NYPSC staff), it soon became apparent that security issues could be resolved (by use of line-of-sight security escorts). Bell Atlantic was left to arguing that this form of cageless collocation should only be available in a limited number of central offices for limited purposes.

The New York Commission affirmatively rejected Bell Atlantic's attempt to limit the availability of cageless physical collocation and ordered Bell Atlantic to provide it wherever "technically feasible" (Attachment 2, pp. 22-23, 40). Although the exact costs of this cageless option have yet to be determined,[6] Covad anticipates that this offering will considerably lower the costs of physical collocation in New York. Indeed, Covad is planning to expand the geographic reach of its services in New York State because of this forward-looking decision. As a result, the real "winners" in this case are residents of towns like Hicksville, Farmingdale, and Brentwood, where Covad has been unable to obtain cage-based collocation from Bell Atlantic.

The Commission should look not only at the results of the New York experience but at the credibility of the arguments raised by Bell Atlantic. Instead of arguing technical feasibility—which is the relevant legal standard—Bell Atlantic argued to limit the number of offices in which this option would be available. The Commission should be prepared to receive—and reject—similar rear guard strategies by ILECs that are designed to cover their retreat from their original, anticompetitive assertions that do not withstand realistic scrutiny.

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[5] Case 98-C-0690, *Proceeding on Motion of the Commission to Examine Methods by which Competitive Local Exchange Carriers can Obtain and Combine Unbundled Network Elements*, Opinion and Order (NYPSC, issued Nov. 23, 1998) (Attachment 2).

[6] The NYPSC ordered Bell Atlantic to file a conforming tariff, and that tariff has yet to be filed (Attachment 2, p. 40).

3. *Texas PUC Staff Recommends Cageless Physical Collocation and Detailed xDSL Spectrum Management Process (Attachment 3).*

After an extensive collaborative process involving SBC's subsidiary, Southwestern Bell Telephone Company ("SWBT"), and a broad array of CLECs and IXCs, on November 18, 1998, the Staff of the Public Utility Commission of Texas issued its Final Staff Status Report on its investigation of SWBT's interLATA entry.[7] The Texas Staff Report contains several detailed recommendations that are highly relevant to the *Advanced Wireline Services* docket and should serve as a model as to how state and federal regulators can encourage the competitive deployment of broadband services.

Attachment 3 contains several excerpts from the Texas Staff Report, including the following recommendations—

Cageless Physical Collocation

- Texas Staff recommended that SWBT provide cageless physical collocation in which "CLEC facilities and SWBT's will occupy the same conditioned space within Central Offices." CLEC space would be designated "by tape on the floor or other markings" but not be "physically closed off." (Attachment 3, p. 44). CLECs would be able to obtain space 10 square feet increments (Attachment 3, p. 45).
- SWBT's security concerns can be addressed through a variety of security procedures including background checks, certification of CLEC technicians, disciplinary procedures for infractions, installation of swipe cards, keyed access, cameras and/or logs, and indemnification/reparation for damages. (Attachment 3, p. 45).
- Importantly, Texas Staff recognized that CLECs should *not* be required to foot the entire bill for these security measures. Texas Staff stated that imposing the cost of creating a segregated collocation room solely upon CLECs "is problematic because CLECs are required to pay for the separate area so that SWBT can provide a secure and more reliable service to SWBT's own end use customers" (Attachment 3, p. 43). As a result, Texas Staff recommended that the cost of cageless collocation not include any costs for physically segregating the collocation area. For other security measures (e.g., background checks), SWBT could only recover one-half of the recurring and non-recurring costs from collocators (Attachment 3, p. 45).

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[7] Project No. 16251, *Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market*, Final Status Report on Collaborative Process (Tex. P.U.C. Nov. 18, 1998) (selected excerpts in Attachment 3).

Unbundling Loops Capable of Supporting DSL Services

- SWBT should offer unbundled xDSL loops in "any exchange or wirecenter," regardless of the fact that SWBT has delayed its own retail offering of DSL services in Texas (Attachment 3, p. 64).
- SWBT cannot have "unilateral decision-making authority with respect to spectral management procedures" for unbundling loops capable of supporting xDSL services. CLECs must be involved in the spectral management process and the process must encompass an industry-accepted solution "and not a local ILEC's interpretation of Spectrum Management requirements." (Attachment 3, p. 61).
- Including both CLECs and ILECs in spectral management process "will allow for better utilization of the copper cable plant and permit the advanced data services market to reach its fullest potential." In resolving spectral issues related to existing T1 services, the "new xDSL services should be afforded the maximum growth opportunity, which is not afforded in the current SWBT proposal" (Attachment 3, pp. 61-62).
- Staff recognized that significant sources of potential spectral interference are legacy services, such as certain older T1 technologies. Staff recommended a comprehensive spectrum management process that includes migration of interference-causing legacy services (e.g., repeater-based T1s) to non-interfering technology or separate binder groups, so as to minimize potential interference with xDSL technology (Attachment 3, pp. 62-63).

The detail of the Texas Final Staff Report on collocation and xDSL loop issues demonstrates the Texas PUC's commitment to the goals of competition and broadband deployment. The Texas Staff's proposals regarding spectral management are roughly analogous to the immediate solution that Covad has advocated in the *Advanced Wireline Services* proceeding—spectrum management must not be left to the *diktat* of the incumbent LEC, spectral issues should not be used to inhibit the deployment of new services, and spectral interference issues can be resolved on the basis of mutual non-interference. The Texas Staff Report also demonstrates that the Commission should not blindly trust ILEC assurances about their unilateral spectrum management policies, because such one-sided policies can be used to deny or hinder competitive entry.

4. California Staff and ALJ Recommend that Collocation and xDSL Loop Issues be resolved before ADSL and interLATA entry by Pacific Bell (Attachment 4).

Last week, Administrative Law Judge Reed of the California Public Utilities Commission ("CPUC") recommended that the CPUC find that Pacific Bell had not fully implemented the Section 271 checklist.[8] Attachment 4 contains excerpts from that proposed decision, which draws heavily upon a comprehensive CPUC staff report issued earlier this year after an extensive investigation.

During this process, concerns were raised because Pacific Bell had begun to provide ADSL service (utilizing new central office equipment) from offices that ostensibly had "no space" for physical collocation of CLEC DSL equipment. In response to these concerns, CPUC Staff and ALJ Reed recommended that the CPUC decide that "[i]n any CO in which all options for physical collocation offered by Pacific have been exhausted, Pacific shall not be permitted to provide additional space in that CO for any of its affiliates." In addition, Staff and ALJ Reed recommended that Pacific should immediately be required to "demonstrate that it has not prospectively deployed ADSL technology out of any CO in which all options for physical collocation offered by Pacific have [been] exhausted, and competitors are not able to collocate to offer their own xDSL service" (Attachment 4, p. 123). Significantly, ALJ Reed explicitly decided that virtual collocation is *not* a viable option for CLECs seeking to provide xDSL services—a position consistent with the position taken by Covad and other CLECs in the *Advanced Wireline Services* proceeding.[9]

With regard to unbundled loops provided over integrated digital loop carrier ("IDLC") systems—a critical issue related to DSL deployment—ALJ Reed explicitly recommended that Pacific Bell "provide quarterly reports to the Director of the Telecommunications Division on its deployment of IDLC loops so that the Commission can monitor IDLC penetration in Pacific's network. Pacific should provide the report for three years unless renewed by Commission action" (Attachment 4, p. 162-63).[10] In addition, ALJ Reed and Staff recommended that Pacific be required to demonstrate that the spectral management program that it employs is competitively neutral (Attachment 4, p. 166).

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[8] Rulemaking on the Commission's Own Motion to Govern open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks, *et al.*, R.93-04-003/I.93-04-002 and R.95-04-043/I, Draft Decision of ALJ Reed (Cal. P.U.C. Dec. 1, 1998) (excerpts in Attachment 4). The complete text of ALJ Reed's Draft Decision may be found at http://www.cpuc.ca.gov/telecommunications/271_application/alj_prop_dec/271_prop_dec_index.htm.

[9] The arguments considered by ALJ Reed relating to the viability of virtual collocation are essentially those presented to the AAA panel in the Covad/Pacific Bell arbitration case. Not surprisingly, the AAA panel came to a similar conclusion as ALJ Reed, finding that "virtual collocation is a disadvantageous method of collocation . . ." (Attachment 1 at ¶ 29).

[10] Covad has advocated a similar process in the *Advanced Wireline Services* proceeding.

Notwithstanding the issues addressed above, and despite six weeks of technical meetings and five weeks of collaborative workshops involving CPUC staff and carriers, ALJ Reed recommended that the CPUC defer several other highly significant issues—including several specific collocation issues and terms for alternative collocation arrangements—to other CPUC proceedings. Any further delay of critical decisions like these ultimately serves the interests of the ILECs, who seem to prefer to revel in additional regulatory battles than resolve these issues.

* * *

The four documents attached to this letter demonstrate the commitment that carriers like Covad, independent third-party arbitrators, and several State commissions have made in ensuring that the Telecommunications Act is implemented in a manner that advances the availability of competitive broadband services to American consumers.

While the attachments reveal that progress is being made in a few states, many states still have not addressed these issues, and many critical decisions continue to be deferred.[11] Quite frankly, even where expedited processes are available, such as Covad's arbitration with SBC, those processes consume valuable time and effort.[12]

Therefore, while Covad was ultimately successful in its arbitration against Pacific Bell, the Commission (and State regulators) must remember that citizens unfortunate enough to live in Menlo Park and similar communities served by ostensibly "no space" offices had and are currently having their competitive options artificially restricted *solely* due to capricious actions of their incumbent LEC.

Similar unfortunate stories can be told throughout the country, in places like Ashburn, Virginia, Hinsdale, Illinois, and Daytona Beach, Florida—communities served by offices in which the local ILEC has claimed that there is "no space" for physical collocation. In addition, some ILECs wish to engage in a type of red-lining by only agreeing to provide unbundled xDSL loops from central offices in which they choose to provide DSL service—offices which also mysteriously turn out to have "no space" for physical collocation. Rationing DSL loops to the well-heeled communities of the ILEC's choosing discriminates against carriers like Covad who want to provide service on blanket basis throughout a market.

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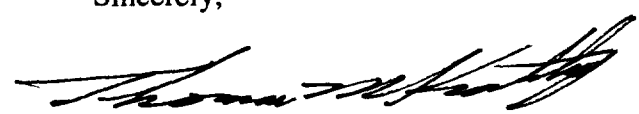
[11] As discussed above, ALJ Reed recommended that the CPUC decide several issues related to cageless physical collocation and xDSL loops in another proceeding. In addition, the form of cageless physical collocation ordered in New York must still be tariffed by Bell Atlantic, so pricing and time intervals for this option must still be examined by the New York Commission.

[12] Indeed, a significant section of ALJ Reed's draft decision is devoted to SBC's refusal to comply with a commercial arbitration award won by AT&T and SBC's opposition to reform of the CPUC's dispute resolution process, which staff and ALJ Reed described as being "in shambles" (Attachment 4, pp. 138-39).

Therefore, while the attached decisions demonstrate ultimate success, they also paint a vivid picture of the ILEC attitudes and laborious processes that CLECs like Covad must endure in order to achieve these successes. The Commission can effectively endorse, bolster and spread the successes described above nationwide by implementing national minimum standards for cageless physical collocation and unbundled xDSL loops that learn from and draw heavily upon the experiences described in these attached documents. Covad appreciates the commitment the Commission has placed upon broadband issues and urges the Commission to act upon these issues with dispatch.

Sincerely,



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Larry Strickling, Chief, FCC Common Carrier Bureau
Dale Hatfield, Chief, FCC Office of Engineering and Technology
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AMERICAN ARBITRATION ASSOCIATION

In Re the Arbitration of:	)	Case No. 74 Y181 0313 98
	)	
COVAD COMMUNICATIONS COMPANY, Claimant	)	
	)	
and	)	Interim Opinion With Respect To Covad's Claims For Breach Of The Interconnection Agreement And Injunction
	)	
PACIFIC BELL, Respondent	)	
	)	

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the Arbitration Agreement entered into by the above-named parties dated April 21, 1997, and having been duly sworn and having duly heard and examined the submissions, proofs and allegations of the Parties, Find, and conclude, with respect to Covad's claims for breach of the Interconnection Agreement as follows:

JURISDICTION

1. The arbitrators' jurisdiction is based on the Interconnection Agreement between Covad Communications Company ("Covad") and Pacific Bell ("Pacific") dated April 21, 1997 ("the Agreement"). The Agreement provides (in relevant part) in Section 18:

> 18.1 Any controversy or claims arising out of or relating to [the] Agreement or any breach hereof, shall be settled by arbitration in accord with the Commercial Arbitration Rules of the American Arbitration Association ("AAA"). . . .
>
> 18.2 The AAA panel shall award costs, including reasonable attorney's fees, to the successful Party at the conclusion of the hearing. Should any party refuse to arbitrate controversies or claims as required by this Agreement, or delays the course of arbitration proceedings beyond the times set, or permitted by the AAA panel, then such Party shall pay all costs, including reasonable attorney fees, of the other Party, incurred with respect to the entire arbitration and or litigation process, even though such refusing or delaying Party may ultimately be the successful Party in the arbitration and/or litigation.
>
> 18.3 The judgment upon the award rendered may be entered in the highest Court of the forum capable of rendering such judgment, either State or Federal, having jurisdiction and shall be deemed final and binding on both of the Parties.

THE AGREEMENT

2. The Agreement is integrated (Section 22) and is not ambiguous. It is governed by California law and the Telecommunications Act. The Agreement recites that it is "intended to promote independent, facilities-based local exchange competition by encouraging the rapid and efficient interconnection of competing local exchange service networks." It also recites that the parties "seek to accomplish interconnection in a technically and economically efficient manner in accordance with all requirements of the Telecommunications Act of 1996."

3. The Agreement is the direct result of the Telecommunications Act ("the Act"), which was intended to promote competition in all telecommunications markets. The legislation requires incumbent local exchange carriers such as Pacific ("ILECs") to offer competitive local exchange carriers such as Covad ("CLECs") access to their local telecommunications network by providing interconnection, unbundled network elements, and the opportunity to purchase wholesale the services ILECs offer to retail customers. Covad contracted for interconnection through collocation, and for transport and loops.

COVAD'S CLAIMS

4. Covad claims that Pacific has breached its contractual obligations with respect to collocation by:

(1) Denying Covad's requests for physical collocation and offering instead virtual collocation, without a demonstration by Pacific and a determination by the CPUC that "physical collocation is not practical for technical reasons or because of space limitations." Section 11.5.
(2) Denying collocation space in numerous COs where, in fact, space for physical collocation existed.
(3) Failing to provide physical collocation, in these locations where Pacific offered it, in a timely, workable manner.
(4) Failing to provide loops and transport in a timely, workable manner, missing many loop and transport deadlines.

5. Covad claims that Pacific has breached its contractual obligations with respect to the express and implied covenants of good faith and fair dealing in connection with its practices in providing physical collocation.

6. Covad claims that Pacific has violated its statutory duty under the Telecommunications Act and the corresponding FCC regulations by:

(1) Failing to provide for physical collocation of equipment necessary for interconnection.
(2) Failing to negotiate in good faith by its unjustified insistence on caged physical collocation and by its failure to cooperate to resolve its alleged interconnection space limitations.

(3) Failing to provide collocation and interconnection on "just, reasonable and nondiscriminatory terms."

7. In addition to damages for the alleged breaches, Covad seeks injunctive relief.

FINDINGS AND CONCLUSIONS WITH RESPECT TO PERFORMANCE AND BREACH

Breach of Contract

8. No matter whose performance statistics are accepted, Covad's or Pacific's, it is apparent that Pacific breached the Agreement with respect to the provision of collocation services. Pacific admits as much. There is no dispute that of 18 cages scheduled for delivery to Covad in February 1998, 15 were delivered late. At least 35 out of a total of 77 completed collocation cages have been delivered an average of 35 days beyond the 120-day interval mandated by tariff. [Ex. 45] As Pacific acknowledges, the 120-day interval is not optional. [Ex. 144] Furthermore, no cage actually operates when it is turned over; rather, the turnover date merely signals that Pacific will accept orders for transport, with a delivery date of up to 19 business days. (A delivered circuit, moreover, is not necessarily an operational circuit. Even a non-operational circuit that is in place within the agreed upon interval is counted by Pacific as delivered on time.) Although there is disagreement about the exact number, by either parties' count, somewhere between 200 and 570 circuits have been delivered late or inoperable through failures of Pacific. [Ex. 269]

9. Pacific also breached its duty, mandated in the Act and reflected in the Agreement, to demonstrate that, where it so contends, physical collocation is not practical for technical reasons or because of space limitations, and to obtain a determination of that status from the CPUC, before offering virtual collocation. [47 USCA 251 (c) (6); Section 11.5]

Good Faith Performance and Fair Dealing

10. The Agreement contains an express covenant of good faith. Section 34 provides:

> In the performance of their obligations under this Agreement, the Parties shall act in good faith and consistently with the intent of the Act. Where notice, approval or similar action by a Party is permitted or required by any provision of this Agreement (including, without limitation of the obligation of the Parties to further negotiate the resolution of new or open issues under this Agreement), such action shall not be unreasonably delayed, withheld or conditioned.

In addition, under the implied covenant of good faith and fair dealing, neither party may act to deprive the other of the benefits it has bargained for under the Agreement. Pacific breached its obligation of good faith performance and fair dealing.

11. Pacific did not act in good faith in its assessment of collocation space available for Covad. Pacific denied physical collocation in approximately 50 of 150 Central Offices ("COs") requested by Covad. Early in the relationship Covad sought additional detail regarding a series of summary denials and the possibilities of later availability of space at the denied locations. [Ex. 180] Pacific responded by refusing to provide any additional information and representing that "the space determinations were made only after careful evaluation of the available space in the individual central offices." [Ex. 170] However, in April 1998 Pacific "resurveyed" its offices and changed the status of 54 of 82 resurveyed COs. Previous denials, apparently based on "careful evaluation," were summarily reversed. [Ex. 41] Thus, for instance, of five COs requested for collocation by Covad and denied "due to no space being available" in November 1997, all but one were found to have space for physical collocation—some, even by Pacific's reckoning, with space for up to five collocation cages. [Ex. 166; Ex. 41]

12. Covad ranked COs according to their demographic importance for collocation in carrying out its business plan. Menlo Park 11 ranked eighth and was included on the first list of requests for collocation submitted by Covad. Pacific denied Covad physical collocation in Menlo Park "due to no space available" in its November 1997 notice. [Haas; Ex. 166] In the April resurvey communication, Pacific still listed the Menlo Park 11 CO as "exhausted." [Ex. 127; Ex. 104]

13. As a part of the arbitration discovery process, the parties agreed that Covad would be allowed inspection of Menlo Park 11. (Pacific expressed satisfaction that the Menlo Park CO had been chosen for inspection, asserting through its attorney that it was a good example.) As recently as August 28, 1998, Pacific represented to Covad that there was "no space" in Menlo Park 11. [Ex. 61 at C18747] The inspection proceeded in the week before the arbitration. Pacific announced in its opening statement that space for collocation had been found at Menlo Park 11, and Covad would be offered physical collation at that CO.

14. Photographs, the floor plan, and testimony from both Pacific and Covad witnesses demonstrated unequivocally that Menlo Park 11 had ample space for several cages (although the witnesses did not agree on the number.) [Exs. 6-11]

15. Pacific has guidelines for finding space for collocation, promulgated in 1993 and revised in 1998. [Ex. 153] However, by its own admission, the guidelines have been followed inconsistently or not at all. In a memorandum dated April 20, 1998, a Pacific employee responsible for making recommendations on collocation requests wrote: "We have never seen the collocation guidelines, regarding how much space we can reserve for our own use, in writing." The recommendation made by the employee is perhaps more telling:

> I recommend that we deny this collocation request. I don't think it was ever the intent of collocation to trigger us to build brand new central office just because we gave up all our growth space to collocation cages. If we are obliged to build collocation cages, I suggest that we first develop an [sic] plan for serving this

area, which could involve many alternative solutions and take 2-3 years to implement. [Ex. 69]

16. Menlo Park 11 is not an isolated incident. Since the hearing, space has apparently been found in several more COs; five were among the COs Pacific claimed had "no space" in August 1998. [Ex. 61] Pacific's conduct in finding space for collocation has deprived Covad of the benefits of its bargain. Covad was an early adopter of the opportunities offered by the Act. Having entered into the first non-arbitrated agreement with Pacific [Ex. 225], and having jumped through the procedural hoops necessary to apply for collation (including the completion of Pacific's multi-page form [Ex. 68]), Covad had a reasonable expectation that where space was available, it would be on its way in the process of building its business. It could offer its customers (corporations and ISPs) and their clients (end users) high speed digital communications with wide local coverage. Instead, where space was initially denied, but later allowed, Covad has been delayed at least a year in establishing its facilities. [Haas, Rugo, Khanna]

17. Pacific has breached its obligation of good faith performance in a more fundamental and pervasive way. Throughout the Agreement, as well as in Section 23, continuing cooperation and negotiation are contemplated to resolve ongoing issues. [See, for example, Sections 18, 1.10, 1.12.1, 1.14] Covad made several attempts to forestall or resolve obvious problems through communications at upper levels of management. Mr. McMinn's letter of August 28, 1997, for instance, raises several issues, including delayed delivery and line ordering procedures. [Ex. 176; see also Exs. 177, 179, 180] Covad called a high level meeting on December 17, 1997, to discuss its concerns about timely delivery of cages, among other things. Pacific's responses, almost without exception, defended Pacific's practices, provided reassurances of performance, or denied there were problems. [Exs. 170, 177, 207; Stanley] In many cases Pacific's reassurances were patently unfounded, as when Pacific defended its space decisions as carefully evaluated or committed, in December 1997, to on-time delivery of cages. When Covad proposed collocation through the use of CEVs, Pacific rejected the proposal, but has recently reversed itself. [Ex. 207] These failures of Pacific to follow the dictates of good faith performance in the Agreement exacerbated the harm to Covad from Pacific's non-performance.

18. The problems with ordering circuits based on the Paragraph 4 definition offer an example. That ordering problems were possible, if not likely, is evident from Mr. McMinn's letter, as well as from various regulatory agency discussions. [Ex. 35, paragraphs 157-58; Ex 33, at 24-25, 102] The recognized problem is that while the ILEC understands its facilities, the CLEC understands the needs of its own technology. Those two understanding must come together to assure that the CLEC will be able to order facilities that work with its particular technology. Mr. McMinn offered a solution in August 1997 that has since been recommended by at least one agency and is now apparently being considered by Pacific.

19. Mr. McMinn's suggestion was rejected by Pacific, but no workable alternative was offered in its place. By the end of 1997, Covad made requests for training on how to

order the circuits. Training was finally made available, after "escalation", but the problem of delivery of inoperable circuits persisted. [Rugo] Another meeting was convened in June 1998, and the parties agreed on a solution that turned out to be no solution at all: Covad put the designation "DSL—no electronics" on its orders in the "Remarks" column. Pacific, with ready knowledge of the actual length of a loop (rather than Covad's "driving distance" estimate), in some cases filled Covad's "DSL—no electronics" orders with dry lines over 17,000 feet long—lines Pacific knew would probably not operate and would not be assigned in providing its own retail services. [Ex. 229; Boggs] Pacific faults Covad's reluctance to tell Pacific what specific applications were being ordered, but as Covad points out, Covad had no incentive to order an incorrect circuit. On the other hand, Pacific may have had less than a strong incentive to correct the problems: it was rolling out a competitive service during 1998.

Claims Under the Telecommunications Act

20. Covad's claims are addressed in the separate Interim Opinion With Respect to Covad's Telecommunications Act Claims.

PACIFIC'S DEFENSES

Commercial Reasonability and Force Majeure

21. Pacific points to "unprecedented and unforeseen growth in demand" as the basis for two of its defenses. Given such demand, it argues, its performance was either "commercially reasonable" or excused under the force majeure provision of the Agreement, Section 19. Pacific failed to prove that the demand resulting from the Act, while it may have been unprecedented, was unforeseen. Even if it had carried its burden on that issue, its legal argument would fail. While demonstrably commercially reasonable conduct might carry evidentiary weight in a determination whether a party has complied with the duty of good faith and fair dealing, it is not a cognizable defense to breach of contract. Pacific's proposed interpretation of the events triggering the force majeure clause is not legally supported, but even if it were, Pacific did not give timely notice that its performance was being interfered with by events beyond its control as required by Section 19.

Limitation of Liability With Respect To Contract Claims

22. The limitation of liability, Section 26, excludes "indirect, incidental, consequential, special damages, including (without limitation) damages for lost profits, regardless of the form of action, whether in contract, indemnity, warranty, strict liability, or tort." Pacific has cited numerous UCC cases to illustrate that the types of damages sought by Covad, for instance, extra material and labor costs associated with obtaining operational equipment, fall into the prohibited categories. The UCC definitions do not apply here, even by analogy. The type of damages contemplated by the UCC as direct damages is non-existent in this context. The UCC provides direct damages for the difference between the value of what was contracted for and the value of what was

delivered, or for cover. The value of Pacific's services, when they are finally delivered, is no different than the value as contracted for, unless lost profits, prohibited in the Agreement, are made an element of the contracted-for value. There is no "cover" available to Covad. Therefore, with respect to the damage claims upon which the Panel has concluded that damages should be awarded to Covad in the Interim Award, none of the asserted bases for limiting Pacific's liability suffices to impose a limitation.

23. Section 26 forecloses damages on the basis of lost profits under the Agreement. Covad has argued that Section 1668 of the California Civil Code dictates that Pacific cannot be allowed to shield itself by contract from its own willful misconduct. Section 1668 provides:

> All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.

"Section 1668 reflects the policy of this state to look with disfavor upon those who attempt to contract away their legal liability to others for the commission of torts." *Blankenheim v. E.F. Hutton & Co.*, 217 Cal. App. 3d 1463, 1471. However, in *Freeman & Mills, Inc. v. Belcher Oil*, 11 Cal. 4th 85 (1995) the California Supreme Court severely narrowed the theory of tortious breach of contract. Breach of the implied covenant of good faith and fair dealing is a contract breach, subject to limitations of damages. *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654 (1988). The Agreement is not a contract of adhesion; the rationale of *Tunkl v. Regents of the Univ. of California*, 60 Cal 2d 92 (1963) does not apply.

Limitation of Liability With Respect To Claims Under the Telecommunications Act

24. The application of Section 26 to Covad's claims for violation of Sections 251 (b) and (c) of the Telecommunications Act is addressed in the separate Interim Opinion With Respect to Covad's Telecommunications Act Claims.

Liquidated Damages

25. Pacific contends that Covad may not recover the liquidated damages prescribed in Appendix C because Covad did not provide Pacific with forecasts. However, the record contains numerous forecasts provided to Pacific. [Ex. 61; Ex. 222] Pacific was asked what type of forecasts it needed, and there is no evidence of a response from Pacific pointing either to quality or quantity shortcomings. Neither side offered definitive testimony on whether Pacific's account manager provided monthly service reports to Covad, or whether Covad gave the account manager forecasts. Pacific failed to meet its burden of establishing this defense to liquidated damages. Covad is entitled to liquidated damages as more fully explicated in paragraphs 32 and 33.

REMEDIES

Injunction

26. According to Covad's general counsel, Covad requires an injunction to complete its buildout and "infill" those areas now preventing full coverage in its selected service areas. Covad has asked for an injunction requiring Pacific to provide collocation services in set time limits, with monetary penalties for failure.

27. Pacific has demonstrated that it has made improvements in on-time provision of service. Pacific employees appearing before the panel seemed, with few exceptions, dedicated to solving the problems that have admittedly delayed their response to the demands of the Act. Pacific has represented to the panel that "Covad's problems with Pacific are a thing of the past" and that it is now "current on meeting its collocation installation period (120 days) with appropriate transport." [Pacific Brief at 6] Pacific shall provide loops and transport strictly in accordance with the terms of the Agreement and the relevant tariffs. The panel declines to order the other provisions of the injunction sought by Covad.

28. In the present circumstance, Pacific remains the sole arbiter of whether physical collocation space is available in a particular CO. There is no mechanism for Covad to test Pacific's decisions and to be assured that it will be afforded space, according to its priority of application, where space is available. (Pacific's offer of third party inspection, aptly described by Covad as "no discovery, nonbinding, you pay," does not pass the "just and reasonable" test.) On the record here, that is not a tolerable situation. Therefore, Pacific is hereby ordered to allow physical inspection of (1) all COs for which Covad has made application for physical collocation and has been denied on the basis of lack of space; (2) all COs for which Covad in the future makes application for physical collocation. Pacific must grant a request for inspection within 10 business days of receiving a written request from Covad. Covad's representative for purposes of inspection shall be a licensed engineer, and Covad and Pacific shall sign a reciprocal non-disclosure agreement to safeguard the confidentiality of proprietary information. Within 5 business days of the inspection, Pacific shall inform Covad whether space is available in the inspected CO. If Covad disagrees with Pacific's decision it may, at its option, pursue the matter before the CPUC or present the issue to the panel, either through written evidentiary submissions or physical inspection. If the panel agrees with Pacific's determination, Covad shall pay for the fees and expenses of the panel in such hearing or inspection. If the panel overrules Pacific's determination, Pacific shall pay the fees and expenses of the panel.

29. In addition, the panel finds that virtual collocation is a disadvantageous method of collocation and may be offered only as provided in the Agreement. [See Ex. 177, Attachment C; Section 11.5]. Pacific has indicated a recent willingness to consider, in addition to 10' by 10' collocation cages, other more flexible forms of physical collocation. Accordingly, in COs where collocation in the arbitrary 10' by 10' cage is not possible, and space is available either for a smaller cage that meets Covad's needs or for a CEV, Pacific is ordered to make those options available to Covad.

30. The panel understands that rules have been proposed addressing space and collocations issues. If the proposed CPUC procedures are adopted, Pacific will no longer be the "sole arbiter," and many of the procedures the panel has ordered will be available, albeit on a different time schedule. However, in light of the panel's findings regarding Pacific's bad faith in connection with Covad's requests for collocation, the proposed rules do not appear to offer Covad an adequate remedy, particularly for past denials. Covad has invoked the commission-approved arbitration provisions in the Agreement for relief from Pacific's violations of the Agreement regarding collocation, and the panel has afforded such relief. Covad is given the option to pursue the injunctive relief awarded by the panel or to rely on the new rules, when and if they are adopted.

31. While the panel declines to order Pacific to provide facilities to Covad in the intervals shorter than those set forth in the Agreement, or to order liquidated damages for late delivery, Pacific may not invoice Covad for transport or loops or for the second 50% of recurring and non-recurring cage charges until collocation services associated with those invoices are fully turned up and functional.

Liquidated Damages

32. Pacific owes Covad liquidated damages. The parties are ordered to meet to attempt to reach agreement on the amount owing within 15 days of this Interim Award. In addition, the parties are ordered to structure a workable framework for resolving ongoing issues of liquidated damages. The framework should include a forecasting format to be filled in and submitted by Covad on a clear and reasonable timetable. In the event that the parties are unable to agree on a liquidated damages calculation, or a framework, or both, the matter shall be submitted to the panel by each party presenting its final calculation and/or framework, accompanied by whatever backup the party deems appropriate. The panel will select one calculation and/or framework. The opposing party shall pay reasonable attorneys fees and the fees and expenses of the panel related to the post Interim Award activities regarding liquidated damages. The panel's decision with respect to liquidated damages will be set forth in the Final Award with respect to Covad's claims for breach of the Agreement.

33. The panel is confident that the parties will be able to work out reasonable accommodations for their mutual needs of timeliness, security and scheduling with respect to inspection of COs and determination of liquidated damages. However, if they are unable to do so, the case administrator will convene a teleconference with the parties and the chair of the panel within 48 hours at the request of either party.

Damages

34. Covad is awarded direct damages for ILEC Resolution Group expenses and for extra labor and truck roll expenses, to be brought current to the date of this Interim Award and provided to the panel, to be set forth in the Final Award with respect to the contract claims. Covad shall file and serve its further evidence by December 2, 1998, and

Pacific shall have until December 9, 1998 to file and serve any opposing evidence. Covad may reply by December 14, 1998.

35. The fees and expenses of the American Arbitration Association (as reported to the panel by the Association) and the compensation and expenses of the arbitrators shall be set out in the Final Award with respect to the contract claims and shall be borne by Pacific.

36. Covad is awarded its reasonable attorneys' fees and costs in connection with its claims for breach of the Interconnection Agreement. Covad shall submit a claim for attorneys' fees to the panel and to Pacific's counsel, with all appropriate backup records (i.e., time sheets, billings and payment records) by December 2, 1998. Pacific shall have until December 9, 1998 to submit to the panel and to Covad's counsel objections to Covad's claim. Covad may reply to the objections by December 14, 1998. The submission shall be treated as confidential. If either party requests a hearing for argument or evidentiary purposes regarding the claim for attorneys' fees and costs or the damages to be awarded pursuant to paragraph 34 of this Opinion, the hearing must be requested no later than December 9, 1998, in writing to the case administrator. The award of attorneys' fees shall be set forth in the Final Award with respect to breach of the Agreement.

37. This Opinion is an Interim Opinion. The further determinations to be made at any further hearing or based on written submissions shall be embodied in a Final Award that shall also incorporate the contents of this Interim Opinion. It is not intended that this Interim Opinion be subject to correction or review pursuant to the California or United States Arbitration Acts.

Dated: November 24, 1998

Lois W. Abraham

Lois W. Abraham

Richard Chernick

Francis O. Spalding

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

OPINION NO. 98-18

CASE 98-C-0690 - Proceeding on Motion of the Commission to Examine Methods by which Competitive Local Exchange Carriers can Obtain and Combine Unbundled Network Elements.

CASE 95-C-0657 - Joint Complaint of AT&T Communications of New York, Inc., MCI Telecommunications Corporation, WorldCom, Inc. d/b/a LDDS WorldCom and the Empire Association of Long Distance Telephone Companies, Inc. Against New York Telephone Company Concerning Wholesale Provisioning of Local Exchange Service by New York Telephone Company and Sections of New York Telephone's Tariff No. 900.

OPINION AND ORDER CONCERNING METHODS FOR NETWORK ELEMENT RECOMBINATION

Issued and Effective: November 23, 1998

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

COMMISSIONERS:

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Thomas J. Dunleavy
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CASE 98-C-0690 - Proceeding on Motion of the Commission to Examine Methods by which Competitive Local Exchange Carriers can Obtain and Combine Unbundled Network Elements.

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OPINION NO. 98-18

OPINION AND ORDER CONCERNING
METHODS FOR NETWORK ELEMENT RECOMBINATION

(Issued and Effective November 23, 1998)

BY THE COMMISSION:

INTRODUCTION

The purpose of this proceeding is to ensure that Bell Atlantic-New York provides competitors with unbundled network elements and means to combine those elements themselves. On April 6, 1998, Bell Atlantic-New York undertook specific commitments[1] in connection with its anticipated application to the FCC to provide in-region long distance service in New York State, pursuant to §271 of the Telecommunications Act of 1996 (the Act).[2] Included is a commitment to provide competitors certain already-combined elements pursuant to express terms and conditions.

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[1] Case 97-C-0271, Pre-filing Statement of Bell Atlantic-New York, filed April 6, 1998 (the Pre-filing).

[2] 47 U.S.C. §271.

With respect to the combination of network elements, in the Pre-filing Bell Atlantic-New York undertook to provide competitive local exchange carriers (LECs)

> the ability to recombine elements themselves through the use of smaller collocation cages, shared collocation cages, and through virtual collocation. In addition, Bell Atlantic-New York will demonstrate to the Public Service Commission that competing carriers will have reasonable and non-discriminatory access to unbundled elements in a manner that provides competing carriers with the practical and legal ability to combine unbundled elements. Among the issues to be discussed in Bell Atlantic-New York's demonstration is the feasibility of 'non-cage collocation'. Bell Atlantic-New York will continue its current, ubiquitous offering of the platform until such methods for permitting competitive LECs to recombine elements are demonstrated to the Commission. This commitment, when met, will permit competing carriers to purchase from Bell Atlantic-New York and connect all of the pieces of the network necessary to provide local exchange service to their customers.[1]

In the Pre-filing, Bell Atlantic-New York also committed to provide competitors with combinations of elements, including the combination of its loop with its port (the UNE platform) upon specified terms and under specified conditions.[2]

In sum, Bell Atlantic-New York offered five methods to serve this purpose; AT&T, Covad, and Intermedia also proposed methods. After exhaustive analysis of the strengths and shortcomings of these options, consideration of competitors' proposals, and collaboration, we are requiring the provision of

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[1] Bell Atlantic-New York Pre-filing, p. 10.

[2] Among these conditions, Bell Atlantic-New York will provide the UNE platform for certain services without an additional or glue charge to serve residential customers for four and six years depending on region. It will similarly provide the UNE platform to serve business customers with a glue charge varying by geographic area, with the exception that in New York City central offices in which there are already two collocated competitive LECs providing service, the platform will not be available to serve business customers.

every technically feasible method available today. These methods, with certain modifications, are sufficient to support foreseeable competitive demand in a reasonable and non-discriminatory manner, in conjunction with its provision of element combinations pursuant to the Pre-filing. We expect Bell Atlantic-New York's commitment to provide competitive carriers with already-combined network elements to moderate the considerable competitor demand for collocation space and work force effort.

These methods, with modifications detailed herein, and subject to the Pre-filing, will be approved upon Bell Atlantic-New York demonstrating (1) the actual availability of the tariffed collocation offerings and other recombination methods; and (2) that each New York City central office in which two competitors are presently collocated and providing service has space for implementation of a satisfactory range of recombination methods.

Upon verification of these conditions by Chairman Helmer in the context of an application by Bell Atlantic-New York to the FCC to provide in-region interLATA service, this approval will take effect.

THE INSTANT PROCEEDING

We instituted this proceeding to define the method or methods by which competing carriers will combine elements and directed Bell Atlantic-New York to propose methods by which competitors could combine network elements and to illustrate how those methods meet Bell Atlantic-New York obligations under the Pre-filing and the Act, providing an opportunity for parties to comment and propose alternatives.[1] Administrative Law Judge Eleanor Stein presided over the fact-finding effort. Her May 14, 1998 ruling instructed parties to include an explanation of how the method would operate; examples of other jurisdictions,

[1] Case 98-C-0690, Combining Unbundled Elements, Order Initiating Proceeding (issued May 6, 1998).

companies, or industries where the method was working; an explanation of how the proposed method could be implemented in a commercially reasonable time period; documentation of the cost of the method; and an analysis of the impact of adoption of the method upon end-use customer service. Subsequently, the parties were requested to demonstrate how each proposed option was susceptible to making the transition to a facilities-based competitive market strategy. Finally, the schedule included a period for collaborative working sessions.

This inquiry opened with Bell Atlantic-New York and other parties proposing options for provision of network elements in such a way as to allow carriers to combine them.[1] From the filings, six distinct options were distilled, which were named and numbered to serve as the organizing principle for the mass of technical, financial, and policy data provided by the parties. From June 29, 1998 through July 1, 1998, at an on-the-record technical conference, advisory Staff and parties' witnesses and counsel examined the offered proposals. Parties presented six exhibits, and a transcript of 784 pages was compiled. Parties presented expert witnesses both to sponsor parties' own options, and to critique or support options sponsored by others. Following the technical conference, parties filed post-trial type

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[1] Parties filing comments, and in some cases proposing options, were: United States Department of Defense and all Federal Executive Agencies (DOD); Covad Communications Company (Covad); Metropolitan Telecommunications (Metropolitan); Cablevision Lightpath (Cablevision), NextLink New York, L.L.C. (Nextlink) and Association for Local Telecommunications Services (ALTS); AT&T Communications of New York, Inc. (AT&T); Time Warner Communications Holdings, Inc. (Time Warner); North American Telecom (North American); Hyperion Telecommunications, Inc. (Hyperion), LCI International Telecom Corp. (LCI); Sprint Communications Company, L.P. (Sprint); WorldCom Inc. (WorldCom); Telecommunications Resellers Association (TRA); USN Communications, Inc. (USN); MCI Telecommunications Corporation (MCI); Teleport Communications Group (TCG); Competitive Telecommunications Association (CompTel); Intermedia Communications, Inc. (Intermedia); RCN Telecom Services of New York, Inc. (RCN); and e.spire Communications, Inc. (e.spire).

memoranda. Members of the advisory Staff team also met with vendors of proposed technologies and examined installations of several offered options.

On May 27, 1998, Bell Atlantic-New York filed its Methods for Competitive LEC Combinations of Unbundled Network Elements. Bell Atlantic-New York offered both physical and virtual collocation to access and combine the complete range of unbundled network elements, asserting it increased the availability and lowered the cost of physical collocation with smaller cages, shared cages, and common space. It also offered competitive LECs the ability to combine voice grade unbundled elements in assembly rooms and assembly points. On June 23, 1998, Bell Atlantic-New York filed a supplemental document including service descriptions for its assembly room and assembly point offerings, and detailing the common space physical collocation option, renamed Secured Collocation Open Physical Environment (SCOPE).

Two other parties offered proposals. COVAD proposed an identified space collocation option, calling for competitive LEC equipment to be placed alongside the incumbent's frames, as in a virtual collocation arrangement. Unlike virtual collocation, however, COVAD's proposal envisioned the competitor installing and maintaining its equipment, employing some range of security measures to protect the incumbent's equipment. Finally, AT&T proposed recent change capability, a software-based option in a preliminary stage of development, to allow competitors to connect loops and ports for existing Bell Atlantic-New York lines without manual disconnects and reconnects.

On August 4, 1998, Judge Stein issued Proposed Findings, including recommendations concerning legal issues, general conclusions, and specific findings of fact regarding each of the six options. She remitted several issues to the parties for collaborative discussion.

On August 13, 1998, Administrative Law Judge Jaclyn A. Brilling convened the collaboration phase; participating were Bell Atlantic-New York, AT&T, LCI, MCI,

Sprint, Time Warner, Intermedia, WorldCom, COVAD, and advisory Staff. In order to accommodate those parties wishing to proceed expeditiously as well as those indicating workload and resource constraints, she convened a working group for issue identification and proposal drafting. The larger group, having been kept apprised of the progress of the working group and having provided it comments, convened the week of September 14, 1998. Some issues were resolved; as to others, the parties were unable to agree.

Filing initial and reply briefs on exception are Bell Atlantic-New York, WorldCom, DOD, Time Warner, Sprint, RCN and USN, TRA, Qwest/LCI, CompTel, e.spire and Intermedia, COVAD, AT&T, and MCI.

GENERAL FINDINGS

Proposed Methods and Parties' Concerns

The methods proposed by Bell Atlantic-New York shared an underlying design, represented in that company's Exhibit 1 (Appendix A). They are all manual methods, and require a Bell Atlantic-New York technician to make numerous manual cross connections, a configuration parties termed the "daisy chain."[1] In contrast, competitors asserted providing service to an existing Bell Atlantic-New York customer requires far fewer manual connections. Within this structure, Bell Atlantic-New York offered to make available a variety of mechanisms.

Competitors expressed interest in utilizing one or another mechanism, depending upon their own facilities and market entry plans. Competitors also expressed some common concerns. Many competitors considered all the manual proposals technologically retrograde, raising the possibility of

[1] RCN's Brief, p. 3; WorldCom's Brief, p. 3.

introducing additional opportunities for human error.[1] They also viewed them as discriminatory, compared to Bell Atlantic-New York's single cross connection to connect a link and a port for its own customer.[2]

A second common concern of competitors was the potential for exhaustion of collocation space, both building space and MDF space. Moreover, facilities-based competitors that employ collocation for their own networks warned that finite space resources will be used unnecessarily for competitor element combination purposes.

Finally, competitors stressed the limitations on Bell Atlantic-New York's capacity to fill collocation orders in a timely manner. Bell Atlantic-New York has committed to provide physical collocation, if certain preconditions are met, within 76 business days; it will provide virtual collocation in 105 business days. According to the Pre-filing, Bell Atlantic-New York stated it could provision 15 to 20 new collocation arrangements monthly.[3] Competitor parties saw no significant time savings in the modified collocation options: the various collocation installations all require approximately the same intervals and work force. Further, Bell Atlantic-New York's witness testified it could take from six to 18 months to augment an MDF if additional space were needed.[4]

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[1] Customers served by digital loops--at the close of evidence 7% but a growing proportion--are combined or multiplexed onto a digital carrier, typically Integrated Digital Loop Carrier (IDLC), and transmitted to a central office. These loops are not individually separated and cross-connected at the Main Distribution Frame (MDF), but go through a digital cross connection directly into the switch. To employ any of the incumbent's methods may require replacing the digital loop with copper to allow a manual connection.

[2] WorldCom's Brief, p. 6.

[3] Bell Atlantic-New York Pre-filing, p. 23.

[4] Tr. 276.

Proposed General Findings and Exceptions

The Judge proposed criteria concerning the ultimate issue in this proceeding: whether any, or some combination of, the options offered by Bell Atlantic-New York and other parties comply with the incumbent's duty to provide unbundled network elements in a manner that allows requesting competitive carriers to combine them in order to provide telecommunications service. She reasoned that this incumbent local exchange carrier obligation implied, at its core, that competitors have a menu of methods to combine elements that, while it need not be perfect, is commercially reasonable and nondiscriminatory with respect to ubiquity, cost, timely provision, service quality, and reliability. To be commercially reasonable, the menu must allow a competitor to obtain and combine network elements on a scale that is consistent with current expectations of competitive demand volume.

Options were examined for ease of competitive entry and for compatibility with the eventual development of facilities-based competition in New York. Options were examined for impact on the service to end-users, customers of both incumbent and competitor carriers; and their impact on the security and reliability of the network. Finally, options were analyzed for ease of customer migration to a competitor's own facilities, to another competitive LEC, or back to Bell Atlantic-New York.

Without reaching the issue of whether collocation, in the abstract, constituted as a matter of law a nondiscriminatory form of obtaining and combining elements, the ALJ proposed a finding as a matter of fact on this record and under these conditions. In her view, this record indicated that Bell Atlantic-New York's collocation-based options alone, absent provision of the platform (or another electronic or otherwise seamless and ubiquitous method), were insufficient to support combination of elements to serve residential and business customers on any scale that could be considered mass market entry. Given this record, at this time, absent the provision of the element platform pursuant to the Pre-filing, she considered

Bell Atlantic-New York out of compliance with §251(c)(3) and, consequently, §271(c)(2)(B)(ii). With the Pre-filing in place, however, the Judge recommended that Bell Atlantic-New York's options--with modifications--provided adequate opportunity for market entrants to serve residential and business customers.

While not excepting, MCI requests clarification of the proposed general findings with respect to the four-to-six year sunset provisions of the Pre-filing. In MCI's view, until an alternative element combination method is available, Bell Atlantic-New York must provide the Pre-filing platform; and Bell Atlantic-New York should not be allowed to withdraw the platform if an alternative becomes available earlier. AT&T excepts to the proposed general findings on the grounds that Bell Atlantic-New York must make an electronic recombination method available to competitors in all central offices, to serve all customers, including the most technologically advanced; and that this availability is a precondition to the institution of combination or glue charges and other limitations contained in the Pre-filing.[1]

WorldCom contends the Pre-filing itself is discriminatory and violates the Act's cost provisions, §252. Time Warner, while supporting the Judge's menu approach, also excepts to the incorporation of the Pre-filing on the ground that provision of the platform without additional or glue charges disadvantages facilities-based competition. It urges us to reject the Pre-filing terms, noting that any efficiency loss resulting from the addition of manual processes should apply equally to all competitors.

Bell Atlantic-New York excepts to the recommendation that it be required to provide the unbundled element platform

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[1] AT&T relies upon the Act requirement that the incumbent LEC provide interconnection with its network at any technically feasible point. 47 U.S.C. §251(c)(2)(B). This decision does not reach the issue of Bell Atlantic-New York's offerings' compliance with §§251, 252, and 271, which will be determined by Chairman Helmer.

until a comparably ubiquitous method is available to serve the mass market. In Bell Atlantic-New York's view, the evidence demonstrated that its menu of combination alternatives supports mass market entry; while the only other software proposal--AT&T's--is costly and years away from development. Bell Atlantic-New York also excepts to a requirement of ubiquity, noting the absence of an express commitment or statutory requirement. However, it also asserts its expanded physical collocation offerings meet that test.

Bell Atlantic-New York excepts as a legal matter to the proposed finding that the availability of the Pre-filing or its equivalent is necessary to the acceptability of Bell Atlantic-New York's recombination menu, claiming this recommendation obliterates the distinction between competitor combination and the incumbent's platform. Time Warner also excepts, opposing the Pre-filing UNE platform on the ground it will discourage investment in facilities-based competition, and suggests the platform only be available at a premium.

Discussion

This record shows that Bell Atlantic-New York's menu of collocation-based options, along with the provision of the Pre-filing platform, should be sufficient to support recombination of elements to serve residential and business customers on a mass market scale. The availability of the platform and lesser combinations is expected to attract considerable competitive traffic. With the modifications discussed below, the collocation-based offerings are reasonable and non-discriminatory.

This conclusion is based in part upon an assumption that the immediate availability of the UNE platform will ease the competitive pressure on Bell Atlantic-New York's collocation provisioning capabilities. To what extent that assumption is justified will depend largely upon the unfolding market choices of the competitive LECs. In the course of this proceeding, competitors made it abundantly clear that they have widely

divergent strategies and requisites. But clearly the UNE platform will be an important means of entering the local market in New York. Bell Atlantic-New York's ability to meet demand for collocation will be examined in the context of the §271 proceeding. This conclusion strikes a balance, making recombination of elements accessible to competitors seeking to enter the market with few or no facilities of their own, without making that the only economically viable market entry choice. Accordingly, parties' exceptions challenging the terms of the Pre-filing are denied.

Based on the parties' filings, comments upon options, evidence adduced at and following the technical conference, post-conference briefs, the advisory Staff investigation, review of the records in related pending Commission proceedings, and briefs and reply briefs on exception, we conclude that the methods offered by Bell Atlantic-New York to competitors to obtain and combine network elements, as modified by the collaboration, comply with the Pre-filing, inasmuch as the availability of the unbundled network element platform under the Pre-filing terms diminishes mass market pressure on collocation. We will apply the criteria and standards established in this opinion to review the compliance filings associated with the No. 916 tariff.

THE OPTIONS FOR NETWORK ELEMENT COMBINATION AND SPECIFIC FINDINGS

Parties proposed six methods: (1) physical collocation (traditional, small cage, and shared cage) (Bell Atlantic-New York); (2) cageless collocation or SCOPE (Bell Atlantic-New York); (3) identified space collocation (Covad and Intermedia); (4) virtual collocation with robot (Bell Atlantic-New York); (5) assembly room/point (Bell Atlantic-New York); and (6) recent change memory (AT&T). The Judge recommended findings as to each option taking into consideration the sponsors' initial filing and other parties' comments; the technical conference; subsequent responses to data requests; Staff conferences with parties and Staff investigation; the parties' post-technical conference

briefs; and portions of the records and filings of related proceedings, where appropriate. Our specific conclusions, based on this record, collaborative consensus where available, and initial and reply briefs on exception, follow.

Option I -- Physical Collocation and Shared Cage (Bell Atlantic-New York)

Traditional physical collocation generally allows a competitive LEC to place its equipment in an environmentally conditioned, secured area of Bell Atlantic-New York's central office.[1] Traditionally, Bell Atlantic-New York constructed 100-square-foot or larger locked wire fenced-in areas, or cages, in a segregated area of its central office building, within which a competitive LEC was allowed to place its transmission and multiplexing equipment.[2]

Bell Atlantic-New York offered to construct less costly 25-square-foot cages, and to allow caged areas to be shared among competitive LECs at no additional cost. A collocated competitive LEC may host another competitive LEC. Bell Atlantic-New York would charge the host competitive LEC but accept orders from both the host and the subsequent occupants.

Of its over five hundred New York central offices, Bell Atlantic-New York at the close of the evidence had 61 with physical collocation. It asserted that these offerings could handle anticipated volumes adequately. Bell Atlantic-New York admitted, however, that if a competitive LEC does not intend to put in its own facilities, and simply wants to market combinations of loops and ports, physical collocation is not a

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[1] Tr. 64.

[2] For combining elements, the competitive LEC installs a simple frame cross connect, and Bell Atlantic-New York runs tie cables from the switch and link sides of its MDF to the competitive LEC frame in the cage. In addition, Bell Atlantic-New York would make cross connections at the MDF. A multiplexer allows two or more signals to pass over one communications circuit.

viable method,[1] because it is not cost-effective unless the competitive LEC needs physical collocation to locate other equipment in order to provide service over its own facilities.

Bell Atlantic-New York stated that physical collocation posed minimal reliability or service quality risk since the unbundled network elements would be combined on facilities which, except for the competitive LEC cross-connect frame, are still within its control.[2] In its estimation, a shared cage would have a slightly higher possibility of adverse impact because of commingling of equipment of several carriers.

Bell Atlantic-New York stated that these physical collocation methods allow a competitive LEC easily to migrate a customer to its own facilities-based service, since the customer's loop is already terminated at the competitive LEC cross-connect frame;[3] the competitive LEC would only have to add transmission equipment. Further, Bell Atlantic-New York asserted these methods allow a customer to easily migrate back to Bell Atlantic-New York or to another competitive LEC.[4]

While physical collocation assertedly makes simple the transfer of customers currently physically connected to Bell Atlantic-New York's switch, another step is required for the customers currently served by digital technology.[5] Links of customers served by Integrated Digital Loop Carrier (IDLC) could not be as easily unbundled. Bell Atlantic-New York noted that it would have to transfer the customers' service either to Universal Digital Loop Carrier (UDLC) or to an available copper pair,[6]

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[1] Tr. 137.

[2] Tr. 140.

[3] Tr. 141.

[4] Tr. 142.

[5] Bell Atlantic-New York Response to Data Request 4.5.

[6] Tr. 120.

before a competitor could combine the loop with either its own or a Bell Atlantic-New York port.

Some competitors found traditional physical collocation often unavailable, sometimes technically unnecessary, and prohibitively costly; some, however, supported the 25-square foot cage alternative. Others warned of the negative impact on network reliability and service, as order volumes dramatically increase,[1] and of longer repair times portended by the additional test points inserted by this or any other physical method.[2]

1. Proposed Findings and Exceptions

The Judge expressed concern as to traditional physical collocation as a nondiscriminatory offering for the purpose of allowing competitors to access and combine the incumbent's unbundled network elements. In the Judge's view, the record gave cause for concern about space availability for new competitive LECs. The availability of space in over 400 offices is unknown. While the addition of the 25-square foot cage option might alleviate the space shortage, it is a limited solution. The record indicated shared space might not provide for easy migration to facilities-based service if more space is needed for transmission equipment and the loops have to be moved to another location.[3] In addition, the smaller space was not shown to be sufficient for combining services other than POTS.[4] The ALJ also concluded that the record revealed that Bell Atlantic-New York can construct a limited number of physical collocation arrangements of all types in a month--15 to 20.[5] Combined with the 76- to 105-business-day-wait to build a cage--and that only

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[1] Tr. 195-96.

[2] Tr. 181.

[3] Tr. 200.

[4] Tr. 212.

[5] Tr. 157.

if forecast by the competitive LEC--market inroads via combining elements will be tediously slow, insufficient to handle possible ubiquitous mass market entry on a commercially reasonable schedule.[1] Further, Bell Atlantic-New York conceded that the cost of collocation, if used strictly for combining unbundled elements, was not attractive.

The Judge proposed finding that traditional physical collocation is a commercially reasonable and highly effective method for competitive LECs to obtain and combine elements where the competitive LEC is already collocated or intends to collocate for additional purposes; however, traditional physical collocation was not recommended as an economical choice solely for the purpose of combining Bell Atlantic-New York-provided loops and ports; nor was it shown to be ubiquitously available statewide. Small-cage and shared-cage collocation mitigate the cost burden, but were seen to have capacity and security limitations.

Bell Atlantic-New York excepts to the proposed finding that its collocation capacity may be too limited, citing subsequent capacity expansion. It also excepts to the conclusion that its alternatives may not support mass marketing by competitors, asserting standard physical collocation is available in 90% of the offices in which it has been requested. In its view, what is lacking for mass market competition is competitive LEC planning and participation. It notes that high volume, high revenue business customers can currently be reached by competitors using physical collocation, asserting the marketplace for high speed services is already considered competitive. To support its view, Bell Atlantic-New York points to its success in collocation installations for COVAD, asserting it worked "with COVAD in establishing dozens of new sites, 28 in the month of July;" Bell Atlantic-New York asserts there "is no legitimate

[1] Tr. 180.

basis for concern about BA-NY's capacity to provide physical collocation."[1]

On reply, however, COVAD characterizes Bell Atlantic-New York's practices as "antiquated" and asserts its collocation performance has fallen far short.[2]

AT&T notes seven other state commissions' negative findings with respect to physical collocation as a method of network element combination.[3] In AT&T's view, collocation--even for CLECs using installed cages to reach remote switches--does not replace electronic provisioning. It also notes that smaller cages are too small to accommodate advanced services, and therefore unsuited to serve the business customers for which the UNE platform will be unavailable.

In addition, AT&T excepts to what it terms the assumption of the Proposed Findings that Bell Atlantic-New York routinely meets the 76-day provisioning requirement. AT&T asserts the evidence shows the incumbent cannot and does not.

2. Discussion

In light of the allegations of COVAD, and other CLEC complaints, further examination is necessary before concluding that Bell Atlantic-New York is providing physical collocation at an acceptable level. Although Bell Atlantic-New York correctly notes that physical collocation need not be available in every central office, this record is incomplete as to its actual availability where offered. Conditional upon a further finding of the efficacy of the provision of physical collocation, in the context of agency verification of compliance in connection with the Bell Atlantic-New York application to the FCC pursuant to

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[1] Bell Atlantic-New York's Brief on Exceptions, p. 5.

[2] COVAD asserts that although 26 cages were turned over to COVAD in July, not one met COVAD's specifications. COVAD's Reply Brief on Exceptions, pp. 1-2.

[3] AT&T cites Massachusetts, Washington, Iowa, Florida, Montana, Texas, and Kentucky. AT&T Reply Brief on Exceptions, p. 4.

§271 of the Act, this method will be approved as part of the menu of options.

Option II -- Secured Collocation Open Physical Environment (SCOPE) (Bell Atlantic-New York)

SCOPE is a physical collocation area located in a secured part of the central office, separated from Bell Atlantic-New York equipment but without a cage enclosure around the competitive LEC equipment. SCOPE entails a conditioned environment identical to a traditional physical collocation environment. The SCOPE is isolated from the Bell Atlantic-New York central office environment, differentiating SCOPE from virtual collocation. Using SCOPE, the collocator is responsible for the installation and maintenance of its equipment. SCOPE uses a shared point of termination (SPOT) bay[1] that may be shared with other competitive LECs using SCOPE. The collocator can place equipment in this arrangement and expand its capacity by adding increments to the frames on the SPOT. SCOPE requires substantially less space per competitive LEC--approximately 15 square feet--than traditional physical collocation.

Bell Atlantic-New York asserted that SCOPE is a workable method of collocation and that it had the capability to implement SCOPE now for anticipated volumes.[2] The interval for provisioning a SCOPE collocation arrangement is 76 business days, although adding a second competitive LEC to an already established SCOPE arrangement may reduce the required installation time.

As to cost effectiveness, Bell Atlantic-New York and some competitive LECs agreed that SCOPE, although less expensive

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[1] A point of termination bay is a small distribution frame adjacent to a collocation area. It is used to cross-connect incumbent LEC cabling from an MDF to the competitive LEC cabling. A SPOT bay is used for multiple competitive LECs.

[2] Tr. 332.

than traditional physical collocation, is not the plan for a competitive LEC to use solely for loop and port combinations.[1]

All parties agreed that SCOPE was demonstrated to be a workable collocation arrangement, and advisory Staff observed such an arrangement in operation in a competitive LEC central office. The facilities-based competitive LECs believed SCOPE was a viable alternative collocation option, but unnecessary simply as a method to combine unbundled network elements. Other competitive LECs agreed that SCOPE worked, but considered it altogether unnecessary,[2] and feared its provisioning would make a limited work force unavailable for other collocation installations. Also troubling to competitors was the lack of information concerning Bell Atlantic-New York's ability to expand MDFs as necessary to accommodate anticipated demand for collocation-based rebundling.

As to migration of customers, AT&T asserted this method failed to provide parity with Bell Atlantic-New York because of the additional cross-connects required of competitors.[3] In addition, it saw SCOPE as limited in that a second competitor acquiring a customer must be collocated in the same central office. Some facilities-based carriers registered that migration to a new carrier using the combination of SCOPE and extended link was what they needed,[4] fearing SCOPE's limitation that competitive LECs must be collocated in the same central office, and that extensive coordination may be necessary between the affected carriers.

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[1] Tr. 333.

[2] Tr. 403, 413.

[3] Tr. 401.

[4] Tr. 335.

1. Proposed Findings, Exceptions, and Collaboration

The Judge found SCOPE advantageous to facilities-based competitive LECs, and they generally supported it, in part because SCOPE reduces both the amount of time and the cost for installation of cabling. On the other hand, the Judge found installation of a SCOPE arrangement remained a lengthy process--the interval is 76 business days, or approximately 60 business days if it is the second competitive LEC in an established SCOPE area. The Judge also warned that the security risk assumed by the competitive LECs using SCOPE is greater than in a traditional secured physical collocation environment.

The Judge also remitted for collaboration the competitors' request to modify SCOPE to permit them to run cross-connects among their installations, currently not allowed by Bell Atlantic-New York.[1] Competitive LECs protested that Bell Atlantic-New York requires them to purchase either its tariffed dedicated cable support or dedicated transit service to connect their equipment in the SCOPE offering, while in a shared collocation cage competitive LECs are free to cross-connect among their installations without restriction. This issue was explored by the parties during the collaborative sessions.

In collaboration, Bell Atlantic-New York agreed to offer competitive LECs the opportunity to connect to other competitors in a contiguous area of the central office by installing their own cabling on either their own dedicated or Bell Atlantic-New York's racking. This offering is approved. As to connection of non-contiguous installations, Bell Atlantic-New York offered this arrangement only where one competitive LEC is

[1] *See* e.spire's Brief, p. 6; Tr. 269, 433; Bell Atlantic-New York Responses to Record Requests 15.5 and 19.

the record owner of the space in both locations.[1] This is an unwarranted limitation and is rejected.

The Judge also recommended, in light of security and network reliability concerns, that competitive LECs be required to place locked cabinets around their equipment or institute other security measures; and that the security problem be discussed in the scheduled collaboration. The collaborative group developed nine security options from which competitive LECs may choose, to match security to specific competitive LEC installations; and a model log to be signed by those with access to the SCOPE area.[2] With two modifications, the collaborative security recommendations are approved. First, the recommendation is approved that collocators clearly identify their equipment area; however, they need not be restricted to any particular identification method. Second, the recommendation to employ video surveillance equipment is approved; however, it need not be mandatory.

2. Discussion

As one offering in a menu of choices, SCOPE affords another physical collocation method entailing less space and investment than traditional physical collocation. With the addition of the security and cross-connection arrangements agreed to in the collaborative process, as modified herein, SCOPE will be approved.

Option III -- Identified Space Collocation (COVAD)

Under this proposal a collocator would install and maintain its own equipment in a defined space within the

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[1] Bell Atlantic-New York's offering is Appendix B. In the course of the collaboration, parties also agreed to a spectrum management protocol (Appendix C) to avoid communications signal interference resulting from the close proximity of carriers' cabling. No party objected to this protocol, and it is adopted.

[2] The security options are attached as Appendix D.

incumbent's central office, to purchase all services and combine all network elements. Competitive LEC equipment would be placed in identified racks dedicated to particular collocators; in this sense it is segregated from Bell Atlantic-New York's equipment. The equipment, installation and procedures involved would meet standard industry requirements. Collocators would pay pro-rata rental charges for the central office space utilized.

Since collocator personnel and equipment are not physically segregated from the incumbent's, alternative security arrangements are of particular significance in this proposal. An Intermedia variation is to allow competitive LEC personnel escorted by a Bell Atlantic-New York security escort into the incumbent's central office to access virtually collocated equipment.[1]

COVAD asserted this method made the best use of all available central office space, and argued that potential network security issues were overblown by Bell Atlantic-New York, suggesting security measures be tailored to the circumstances of each central office.

Some competitive LECs (e.spire and Intermedia) actively supported this proposal while Cablevision maintained that cageless collocation was "necessary if competitive LECs are to be able to compete."[2] Intermedia suggested the use of escorts furnished by the incumbent to resolve the security issue. Other competitive LECs, while not opposing this method of collocation, considered it subject to the shortcomings of other types of collocation for the purpose of combining unbundled network elements.

Bell Atlantic-New York urged that this method would deny it the ability to maintain adequate security over its own network facilities, considering the resulting risks to its

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[1] Intermedia's Brief, p. 7.

[2] Cablevision's Brief, p. 10.

network and customers to be unacceptable.[1] Bell Atlantic-New York emphasized the large number of competing carriers that would have access to its otherwise secure facility areas.

1. Proposed Findings and Exceptions

The Judge concluded that the record established COVAD's option was viable; however, the network security issues were troubling. On these issues, she concluded the record was not adequate to support a recommendation that Bell Atlantic-New York be required to provide this option, referring these issues to collaboration. On exceptions, Time Warner argues carriers willing to accept reduced security should have that option.

2. Discussion

In the course of the collaborative process, Bell Atlantic-New York offered collocation with escort.[2] The offering appealed to participating competitive LECs; however, objections were raised to the requirement that Bell Atlantic-New York central office technicians visually supervise competitive LEC or third-party vendors; the exclusion of central offices where Bell Atlantic-New York has already provided 200 square feet of physical collocation space; and the restriction of its use to obtaining Bell Atlantic-New York unbundled network elements.

The Bell Atlantic-New York collocation with escort offering effectively expands the menu of available collocation options and is approved, with modifications. In light of network reliability concerns, we will adopt the incumbent's supervision requirements. However, the restrictions to certain central offices and certain services limit this offering unnecessarily.

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[1] Bell Atlantic-New York's Summary Presentation, p. 5.

[2] This Bell Atlantic-New York offering is Appendix E. The inclusion of supervised third party vendors satisfies Intermedia's expressed concern that third party vendors be allowed.

This option should be available for all services purchased under intrastate tariffs and interconnection agreements.

Option IV -- Virtual Collocation (Bell Atlantic-New York)

Bell Atlantic-New York currently offers virtual collocation, an arrangement by which the competitive LEC purchases equipment it wishes to use, and Bell Atlantic-New York exclusively installs and maintains the equipment on the competitive LEC's behalf. This arrangement could be used by a competitive LEC to recombine loops and ports through the use of a remotely controlled cross-connect device, or robot. Once the device is installed, Bell Atlantic-New York loops and ports could be terminated on the equipment and the competitive LEC could remotely recombine them. Bell Atlantic-New York would use its existing "hot cut" procedures in connecting its network to the device.[1]

Virtual collocation arrangements are, of course, already used, and Bell Atlantic-New York uses this type of cross-connect device in its network, albeit not for element recombination. Bell Atlantic-New York indicated that two competitive LECs are currently implementing these systems in New York.[2] The implementation period for virtual collocation is 105 business days; however, with only 12 robots in service, the ability of CON-X to manufacture sizable quantities has not been

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[1] Bell Atlantic-New York provided a demonstration at the technical conference of this device, produced by CON-X Corporation (CON-X). This device can be mounted in a standard equipment relay rack in a Bell Atlantic-New York central office. Using a robotics arm, the device places or removes connections as directed by the competitive LEC from a remote work station. The CON-X robot can accommodate up to 1,400 loops, which it can connect to Bell Atlantic-New York and/or competitive LEC ports.

[2] Tr. 502.

tested. That company has been able to deliver a robot within 60 days of order.[1]

As to this method's ability to handle foreseeable volumes of transactions, Bell Atlantic-New York was enthusiastic; however, as to cost-effectiveness, Bell Atlantic-New York rated this method somewhat lower, allowing that if all a competitive LEC wanted to do was reconnect loops and ports other options might be less expensive.

As to the ease of migration of customers to competitors' facilities-based service, Bell Atlantic-New York was very positive, inasmuch as the CON-X robot allows for the simultaneous connection of Bell Atlantic-New York and competitive LEC ports. Migrating a customer from a Bell Atlantic-New York port to a competitive LEC port can be done quickly and remotely with the robot. Regarding ease of migration of customers to a second competitive LEC or back to the incumbent, Bell Atlantic-New York considers this method excellent for migration back to its system, but slightly less so for migration to another competitive LEC, similar to its ratings for the other collocation methods.

This method was rejected by all other parties. Generally, competitors saw it as adding another layer of expensive and potentially troublesome equipment into the network for the recombiners. This method also garnered considerable criticism from parties as to timeliness of provisioning. There was concern about the availability of robots and about the ability of competitive LECs to use the system without extensive training. Similarly, parties were unenthusiastic about this method's cost, stating that the system was really nothing more than an expensive pre-wired frame. Indeed, competitors saw no advantage--and saw considerable additional expense--in purchasing

[1] Tr. 512.

this equipment, as opposed to installing a pre-wired frame in a conventional virtual collocation arrangement.[1]

1. Proposed Findings and Exceptions

The Judge proposed finding that Bell Atlantic-New York's offering did not appear to meet the concerns of most competitors, and that the robot requirement added unnecessarily to virtual collocation costs. She referred to collaboration the issue of allowing competitors to provide pre-wired frames.

Parties did not reach agreement in the collaborative process. On exceptions, Bell Atlantic-New York objects to this option because its workforce would be responsible for all testing and maintenance, and it would be liable for performance failures. It also notes that no competitor is currently seeking to use this method. Competitive LECs assert that they would compensate Bell Atlantic-New York for testing and maintenance.

2. Discussion

Although no competitor is seeking this option today, several indicated future interest; prewired frame may emerge as a viable market entry strategy. Because of the absence of immediate interest, Bell Atlantic-New York should make this option available on a Bona Fide Request basis.

Option V -- Assembly Room and
Assembly Point (Bell Atlantic-New York)

The assembly room and assembly point are innovative options that Bell Atlantic-New York proposed to offer competitive LECs who seek to combine Bell Atlantic-New York links and ports. These options do not require the same conditioned space as traditional forms of collocation, and would therefore be less costly to competitive LECs not using any of their own elements. The assembly room would be located in an secure, unconditioned area of a Bell Atlantic-New York central office and could be

[1] See, for example, Tr. 526-527.

shared by a number of competitive LECs.[1] The assembly point would be used in central offices where constructing an assembly room within the building is not feasible. The assembly point would offer competitive LECs the same technical means of combining Bell Atlantic-New York links and ports, but would either be mounted on the outside wall or pad mounted on the grounds of the central office.[2] The assembly room or point only provides access for voice grade loop and port combination.

The assembly room or point would initially be subject to the same 76-business-day interval used for traditional physical collocation. Subsequent entrants would be able to obtain space in the assembly room or point more quickly.[3] Competitive LECs would be assigned a termination frame or portion of a termination frame, and could either pre-wire the frame or perform cross-connections as they acquire customers. The actual process of transferring a customer from Bell Atlantic-New York to the competitive LEC would be accomplished by Bell Atlantic-New York technicians performing a manual or hot cut. While Bell Atlantic-New York had yet to construct an assembly room or point by the close of this record, the technology involved is not new or complicated and it would not be difficult for Bell Atlantic-New York to demonstrate its ability to deliver this service.

Bell Atlantic-New York stated that the assembly room/point could handle reasonably foreseeable volumes, and that the assembly room/point was designed specifically for the combination of Bell Atlantic-New York loops and ports, and therefore highly cost efficient.[4] Because the assembly room/point would not require conditioning, it would be less

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[1] Tr. 553-554.

[2] Bell Atlantic-New York has indicated that it may in some cases place an assembly point in an unsecured location within its central offices (Tr. 558, 570).

[3] Bell Atlantic-New York's May 27, 1998 filing, p. 19.

[4] Tr. 561.

costly to a competitive LEC seeking to combine Bell Atlantic-New York voice grade loops and ports than other collocation options, according to Bell Atlantic-New York's preliminary cost estimates.[1]

Concerning whether the method minimized potential adverse impacts on end users, Bell Atlantic-New York noted that the assembly room/point offered a slightly less secure environment than traditional collocation.[2] Bell Atlantic-New York noted, however, that competitive LECs could install locking covers to be used within the assembly room for added security.[3] Because the assembly room/point uses the same hot cut procedure as other methods of combining elements, end users should not be adversely impacted if competitive LECs choose this method over others.

Bell Atlantic-New York noted that it would be more difficult to migrate a competitive LEC customer from elements combined via an assembly room/point to the competitive LEC's facilities-based service than with the more traditional collocation options, and therefore rated this method lower in that category. As to migration back to Bell Atlantic-New York or to a competitive LEC using the Bell Atlantic-New York network, Bell Atlantic-New York rated the method very highly. For customers migrating to a facilities-based competitive LEC, Bell Atlantic-New York rated the method slightly lower, because the two competitive LECs would have to coordinate the cutover.[4] As with the question of moving a customer served by a competitive LEC via the assembly room/point to that competitive LEC's own facilities-based service, this transition could be difficult and has the potential to impact customer service.

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[1] Response to Data Request #22, as revised July 10, 1998.

[2] Tr. 561.

[3] Tr. 572.

[4] Tr. 563.

As to timeliness of implementation competitors asserted that, in reality, this method of combining elements cannot be implemented quickly, particularly for the first competitive LEC in a given Bell Atlantic-New York central office. The interval for the initial competitive LEC would be 76 business days, and for subsequent competitive LECs or subsequent orders from the initial competitive LEC the interval would be 60 business days.[1] Further, the same Bell Atlantic-New York personnel now responsible for the construction of physical collocation arrangements would be responsible for assembly rooms/points, and Bell Atlantic-New York has committed to provision only 15 to 20 collocation arrangements of all types per month.[2] Parties asserted that the assembly room/point cannot meet reasonably foreseeable volumes of competitive LEC orders for such arrangements statewide because the initial construction is so time-consuming.

According to competitors, certain element combinations, for example, the loop and transport combination, would not be accessible via this method. Nor would this option be available by competitors using a T1 loop to serve customers.[3] Competitors also correctly noted that this method would make it very difficult for competitive LECs to migrate customers to their own facilities, as a facilities-based competitive LEC would locate its equipment in conditioned space and the assembly room or point would be unconditioned space.[4] The competitive LEC would therefore have to have each customer's loop terminations moved from the assembly room/point to the collocated space.

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[1] Tr. 556.

[2] Tr. 581-582.

[3] Tr. 590, 613; CompTel's Brief, p. 4.

[4] Tr. 600-601.

1. Proposed Findings and Exceptions

Overall, the Judge found the assembly room/point concept to be a creative, viable, economic way for competitive LECs to combine loops and ports in several central offices in the state. Because of the absence of any electronics in the assembly room/point,[1] she found, this method probably has the least potential to adversely affect Bell Atlantic-New York's network of any of the collocation options. Because of the time delay associated with the installation of new assembly rooms or points, however, the ALJ concluded this would not be a feasible statewide entry strategy for even one competitive LEC. She warned that if competitive LECs were to attempt to use this method on a broad scale, Bell Atlantic-New York could be hampered in its ability to deliver traditional collocation arrangements to facilities-based competitive LECs. Moreover, she noted, this offering is limited only to voice grade loop and port combinations. On balance, the ALJ proposed finding that assembly room and assembly point are innovative and useful offerings for lower-cost collocation; several competitors indicate a strong interest in using them. However, their limited applicability and substantial provisioning intervals do not make them effective for statewide mass market entry.

AT&T excepts to the Proposed Finding approving the assembly options noting that, because they are only available to combine voice grade loops and ports, they will not mitigate the loss of the platform for service to New York City business customers, likely to demand higher grade service.

2. Discussion

The assembly room and point option are economical for their limited purpose, contribute flexibility to the Bell Atlantic-New York menu, and will be approved. Several competitors indicate a strong interest in using them. However,

[1] Tr. 576.

they are unlikely to reduce competitive pressures for access to combination of elements to serve business customers.

Option VI -- Recent Change Capability (AT&T)

Recent change capability refers to software-based tools, comparable to those that allow a LEC to update and assign features and functions of its local switch. According to AT&T, the recent change capability is now used by incumbent LECs to disconnect a loop from the switch, that is, to sever service to a customer.[1] Recent change is also comparable to the services afforded a Centrex customer to sever, modify, add functions, or transfer service to an identified family of loops.

1. Feasibility--The Factual Issue

AT&T's proposal was that Bell Atlantic-New York develop or purchase software to allow competitive LECs to employ recent change technology to combine existing loops and ports on the same basis that Bell Atlantic-New York now does. AT&T conceded that this option was not readily demonstrable, although it suggested that Bell Atlantic-New York Centrex customers employ this technology to add or sever lines, add services, or transfer numbers.[2] As to recent change's ability to handle volume, AT&T asserted this method would be able to handle volumes in a manner and on a scale comparable to how presubscribed interexchange carrier changes--millions of transactions yearly--are now effected.[3] According to AT&T, the operation of recent change would be extremely cost effective, once developed, since it is an electronic rather than a manual method of recombining elements.[4] AT&T asserted this method, because it minimizes manual loop

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[1] Falcone Affidavit, June 16, 1998, ¶¶105 *et seq.*

[2] Tr. 672. AT&T estimated development time at roughly one year. Tr. 656.

[3] Tr. 678.

[4] Tr. 678-679.

manipulation, will minimize adverse impacts on end users.[1] A firewall, proposed AT&T, would protect the incumbent LEC by restricting competitor access to its customers and links.[2] AT&T describes its firewall security as standard: transactions are controlled based on the rights and privileges of the user logged into the firewall. Migration to another competitor or to the incumbent would be as simple as changing long distance providers as long as the other competitive LEC also has recent change access. Similarly, it would be simple to migrate back to the incumbent LEC.[3]

In a post-technical conference supplemental filing, CommTech, the vendor/developer of the software proposed by AT&T to implement recent change, explained that this new software would consist of a modification of its FastFlow system currently employed by LECs to allow Centrex customers to access the recent change process in the LEC switch. Bell Atlantic-New York acknowledged the capability of Centrex customers to make limited changes to the switch, using Macstar.[4] However, it estimated the development time required for this to be implemented on the scale contemplated here as "a number of years".[5] As to cost, Bell Atlantic-New York asserted that the front-end development costs for the firewall, as well as the competitive LEC interface, render recent change prohibitive.[6] Bell Atlantic-New York suggested that its legacy systems are complex, and difficult to modify,[7] listing the systems a firewall system would need to reference in order to effect the changes required to move a

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[1] Tr. 680.

[2] Tr. 681-682.

[3] Tr. 684-686.

[4] Tr. 747-748.

[5] Tr. 755.

[6] Bell Atlantic-New York's Summary Presentation, p. 13, n. 25.

[7] Albert Affidavit, July 10, 1998.

customer from the incumbent to a competitor, or between competitors. According to Bell Atlantic-New York, millions of lines of code would have to be written to realize the system modifications required for recent change. In response to AT&T's supplemental filing concerning its recent change proposal, Bell Atlantic-New York asserted that recent change is inadequately documented, ambitious, and burdensome.

Bell Atlantic-New York also stressed AT&T's admission that this approach imposes a risk of significant customer outages, with some customer outages inevitable due to problems between the processing of messages to suspend and restore service.[1] Bell Atlantic-New York asserted that, inasmuch as the recent change proposal will, according to the vendor, work best if operated by Bell Atlantic-New York itself through its provisioning system, the proposal was little more than a loop and port combination provided by Bell Atlantic-New York.[2] Facilities-based competitors viewed recent change as violative of parity because it potentially relieved competitors without their own facilities from the burden and risk associated with manual interconnection.

The Judge concluded that, while AT&T had failed to present a convincingly detailed case for recent change, its fundamental assertion was well founded: an electronic method for obtaining and combining network elements, or a comparable substitute, appeared essential for mass market competition. Because of the importance of exploring and developing software methods for competitors to obtain and combine unbundled network elements, she remitted this issue for collaboration.[3]

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[1] Albert Affidavit, ¶9, quoting AT&T's Comments, p. 67.

[2] Albert Affidavit, ¶18, citing CommTech Affidavit, ¶8.

[3] The Judge also recommended that the costs of development of recent change should be borne, at least in part, by competitive LECs. Time Warner seeks clarification that development costs should be apportioned based on competitors' use of recent change during its first year.

On exceptions, WorldCom asserts Bell Atlantic-New York must make recent change available and, with DOD, excepts to the failure to establish a date certain by which it must be provided. TRA, on exception, reiterates that only recent change offers competitors parity. AT&T stresses the increased likelihood of human error attendant upon adding numerous manual, mechanical connections, compared to developing an electronic recombination method.

In the course of the collaborative discussions, AT&T developed its proposal in greater detail and depth. Parties differed dramatically, however, as to the time necessary to develop the recent change method.

2. Physical Separation and Reconnection-- the Legal Issue

Bell Atlantic-New York asserted the Act and the Eighth Circuit decision require a physical separation or unbundling of network elements, and a concomitant physical recombination of these elements by competitors. In its view, AT&T's recent change proposal or, for that matter, any method not entailing physical, manual disconnection of the loop from the port, fails the Eighth Circuit test. AT&T replied that taking the customer out of service by electronic, as opposed to manual, means complied with the Eighth Circuit requirements.[1]

Judge Stein recommended that while ubiquitous, timely recombination of elements, consistent with mass market entry, is essential, that requirement was best fulfilled in New York at this time by the Pre-filing terms and conditions, in conjunction with Bell Atlantic-New York's other offerings. In her view, the only electronic method under consideration for competitors to

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[1] In MCI's view, by contrast, neither the incumbent nor the AT&T options comply with the Act; MCI urges the Commission to hold that only by providing competitors with specific already-combined elements will Bell Atlantic-New York be consistent with §251(c)(3). As this proceeding was narrowly defined to consider options for competitor recombining of elements, MCI's proposals were not admitted at the technical conference.

combine elements themselves, AT&T's recent change proposal, was insufficiently developed to be adopted at this time. She suggested further exploration of the development of this option in relation to the incumbent's existing or legacy systems in the collaborative phase.

As a threshold matter, the Judge recommended the finding that an electronic system that functionally unbundles and recombines elements complies with the Act, noting the Eighth Circuit wording that a competitor need not have facilities of its own in order to obtain access to the incumbent's network elements.[1]

On exceptions AT&T, TRA, WorldCom and CompTel assert that only with recent change or a comparable electronic technology will Bell Atlantic-New York comply with the Pre-filing and the Act.

Bell Atlantic-New York and Time Warner except to the Judge's recommendation that electronic unbundling and recombination fulfill the requirements of §251(c)(3) of the Act. In Bell Atlantic-New York's view, the recommendation to approve functional rebundling is unacceptable, as the unbundled loop and switch port are physical elements that must be physically combined by competitive LECs to be used. It reiterates its view that the first principle of elements is that they are physically defined, and that simply turning off the line at the switch via a software command does nothing to disconnect the loop and port. In its view, the Judge's recommendation improperly eliminates the Act's distinction between resale and unbundled network element purchase, and would move the competitive LEC industry away from facilities-based competition. MCI, although not excepting, requests clarification that Bell Atlantic-New York's commitment to provide recombination at parity does not expire with the Pre-filing and, conversely, that a Bell Atlantic-New York provision

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[1] The term "network element" includes "features, functions, and capabilities." See 47 U.S.C. §153(29).

of a software recombination method does not obviate the Pre-filing platform commitment.

3. Discussion

Based on the record before us, taken in conjunction with the platform, Bell Atlantic-New York's collocation-based menu should enable competing carriers reasonable and non-discriminatory access to unbundled elements in a manner that ensures their practical and legal ability to combine them. This finding is conditioned on Bell Atlantic-New York demonstrating its ability to process and deliver collocation-based orders in a timely and reasonable manner. Thus, assuming these conditions are met, the company will satisfy this Pre-filing obligation. Because we will not require Bell Atlantic-New York to build recent change capability at this time, it is premature to decide this legal issue.

This Commission has long been committed to the development of a fully competitive local exchange market; to wit, multiple carriers providing a full range of services throughout New York State.[1] Such a market cannot develop unless customers are able to switch easily to the local exchange provider offering the service, price and quality options that best meets their needs. As we move to a fully competitive local exchange market, we will periodically revisit our finding that if Bell Atlantic-New York's collocation-based recombination offerings satisfy the standards described above they, in conjunction with the platform required by the Pre-filing, will comport with Bell Atlantic-New York's recombination commitment.

Our periodic review will focus, in particular, on whether the collocation-based methods allow competitive LECs to combine elements to provide service. If the collocation-based methods have provided adequate entry for a wide range of

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[1] Case 94-C-0095, Regulatory Framework for the Transition to Competition in the Local Exchange Market, Opinion No. 96-13, pp. 2-3 (issued May 22, 1996).

competitors, as we expect, additional action will not be necessary. If, however, competing carriers do not "have reasonable and non-discriminatory access to unbundled elements in a manner that provides competing carriers with the practical and legal ability to combine unbundled elements"[1] we will act.

While our desire to encourage the development of facilities-based competition and preserve investment by facilities-based entrants will cut against extension or replacement of offerings resembling the platform, our overriding policy of fostering an open competitive market will result in corrective action, if necessary, to ensure that competitive LECs have access to unbundled elements in a manner that enables them to combine elements to provide service. Any responsive action on our part will depend on the status of the factors affecting opportunity for competitive entry.

Accordingly, while we do not order Bell Atlantic-New York immediately to build recent change capability, we believe the incumbent should continue productive discussions with all interested parties, and Staff, and apprise us periodically of its progress. We do not reach the question of cost allocation for the development of recent change capability; however, we expect competitive LECs to recognize that, generally, competitors using such technology would be expected to shoulder a proportionate share of the cost, consistent with principles of competitive neutrality and cost causation.

THE TWO-COLLOCATION CENTRAL OFFICES

In its Pre-filing, Bell Atlantic-New York undertook to provide the complete unbundled element platform for the provision of residence and business POTS and ISDN service, subject to time and geographic restrictions. Specifically, the platform will be provided for a duration of 4 years in zone 1, and 6 years in

[1] Bell Atlantic-New York Pre-filing, p. 10.

zone 2,[1] except that, in central offices in New York City where two or more competitive LECs are collocated to provide local exchange service through unbundled links at the start of the duration period, the platform will not be available for business customers.[2] At the time of the proposed tariff filed by Bell Atlantic-New York on July 23, 1998, eleven central offices met this definition.[3]

Proposed Findings and Exceptions

The Judge found that Bell Atlantic-New York's proposed methods for competitors to combine elements, with the provision of the platform in all but this limited number of offices, would give competitors a viable market entry strategy statewide and afford end users choice among providers. For the limited number of offices in which the platform will not be available for service to business customers, she found, Bell Atlantic-New York's methods for combining elements would likely be sufficient for those carriers not already collocated in the affected offices. However, before Bell Atlantic-New York can be found to meet the Pre-filing standard, the ALJ concluded, Bell Atlantic-New York should demonstrate that the main distribution frames in each of these offices have sufficient capacity, or can be expanded in a timely manner, to handle reasonably foreseeable volumes of cross-connects, and should provide us and the parties the specifications as to space constraints in each of those offices, and guarantees that there is sufficient space available for an acceptable range of recombination options.

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[1] Zone definitions are as established by the Commission in Cases 94-C-0095, 95-C-0657, and 91-C-1174.

[2] The duration periods start with the demonstration of availability of certain operations support system upgrades.

[3] These were: Second Ave., Bridge St., Broad St., East 30th, 37th, and 56th Streets, West 18th, 36th, 42nd, and 50th Streets, and West Street. New York Telephone Company P.S.C. No. 916, Section 5, Appendix B, Original Page 1.

AT&T, Sprint, Qwest/LCI, RCN, and LCN, joined by MCI, except to what they view as business service restrictions on the UNE platform in New York City: the restriction of the platform to POTS and basic rate ISDN; the prohibition of UNE platform for business customers in the two-collocation central offices; and the duration of the offering and glue charges in the Pre-filing. In these competitors' view, the Pre-filing commits Bell Atlantic-New York to provide the platform in all locations without charge until it demonstrates competitors have nondiscriminatory access to elements to recombine them, and the Judge incorrectly recommended that the current offerings, plus the Pre-filing, were adequate to protect competitors seeking to serve business customers.

AT&T also excepts to the proposed finding that the menu of options is sufficient to trigger the Pre-filing restrictions. In AT&T's view, Bell Atlantic-New York failed to demonstrate recombination is commercially available for serving business customers in these two collocation central offices. It also excepts to the Judge's refusal to recommend a conclusion on the legal issues as to whether the two-collocation business restriction is precluded by the Act requirement that competitive LECs have access to elements at any technically feasible point.

Discussion

The Pre-filing cannot be read to require that Bell Atlantic-New York provide unlimited collocation opportunities or make every recombination method equally available at every central office. The two-collocation office exception to the availability of the platform for business customers, embodied in the Pre-filing, recognizes that for those customers, in those areas, there is already a significant measure of competitive access and competitor investment. Similarly, the exclusion of Centrex service from the platform offering reflects that this service is already available on a competitive basis. Approval of the Bell Atlantic-New York menu of recombination offerings will not be final until it demonstrates that an acceptable range of

recombination methods is available to serve business customers in those New York City offices in which two competitors are already collocated.

CONCLUSION

We are adopting every technically feasible method available today for competitive LECs to access element combinations to provide service. Based on an examination of the technologies, terms, and conditions of specific methods currently available for obtaining and combining unbundled network elements, we find that the menu of collocation-based options, as modified herein, can be considered adequate to support recombination of elements to serve residential and business customers on a mass market basis, in conjunction with the provision by Bell Atlantic-New York of the platform, on the Pre-filing terms. Upon certain additional demonstrations competitive local exchange carriers may be deemed to have reasonable and nondiscriminatory access to unbundled elements in a manner that enables them to be combined. These demonstrations consist of: (1) Bell Atlantic-New York's ability to provision all collocation-based forms of recombination, as modified in this order; (2) the provision of the unbundled network element platform under the terms and conditions established in the Pre-filing; (3) resolution by this Commission of issues related to the No. 916 tariff; and (4) the demonstration by Bell Atlantic-New York that competitors will have access to a satisfactory range of collocation alternatives to serve business customers in those New York City central offices in which two competitive LECs are collocated.[1]

The Proposed Findings are adopted insofar as consistent with this Opinion and Order; and the exceptions are denied, except insofar as granted herein.

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[1] Bell Atlantic-New York Pre-filing, p. 9, n. 9, 10.

The Commission orders:

1. The Bell Atlantic-New York SCOPE proposal is modified to adopt the recommendations of the collaborative group as to security and cross-connection arrangements and as detailed herein. Bell Atlantic-New York should reflect this determination in its compliance filing with respect to Tariff No. 916 in Case 95-C-0657.

2. Bell Atlantic-New York is required to provide, in its No. 916 tariff compliance filing in Case 95-C-0657, the COVAD identified space collocation method, incorporating the Bell Atlantic-New York collocation with escort offering, so modified as to be available for all services purchased under intrastate tariffs and interconnection agreements, at all central offices where such method is technically feasible, with line-of-sight supervision by Bell Atlantic-New York personnel.

3. Bell Atlantic-New York is required to provide, in its No. 916 tariff compliance filing in Case 95-C-0657, an offering of virtual collocation with a pre-wired frame on a Bona Fide Request basis.

4. The proposed methods for competitive LECs to obtain and combine Bell Atlantic-New York unbundled network elements, as modified herein, in conjunction with the provision by Bell Atlantic-New York of network element combinations pursuant to its Pre-filing Statement, comport with Bell Atlantic-New York commitments. Upon approval of the No. 916 tariff amendments and verification of compliance with the competitive checklist pursuant to 47 U.S.C. §271(c)(2), these methods will be deemed approved.

5. These proceedings are continued.

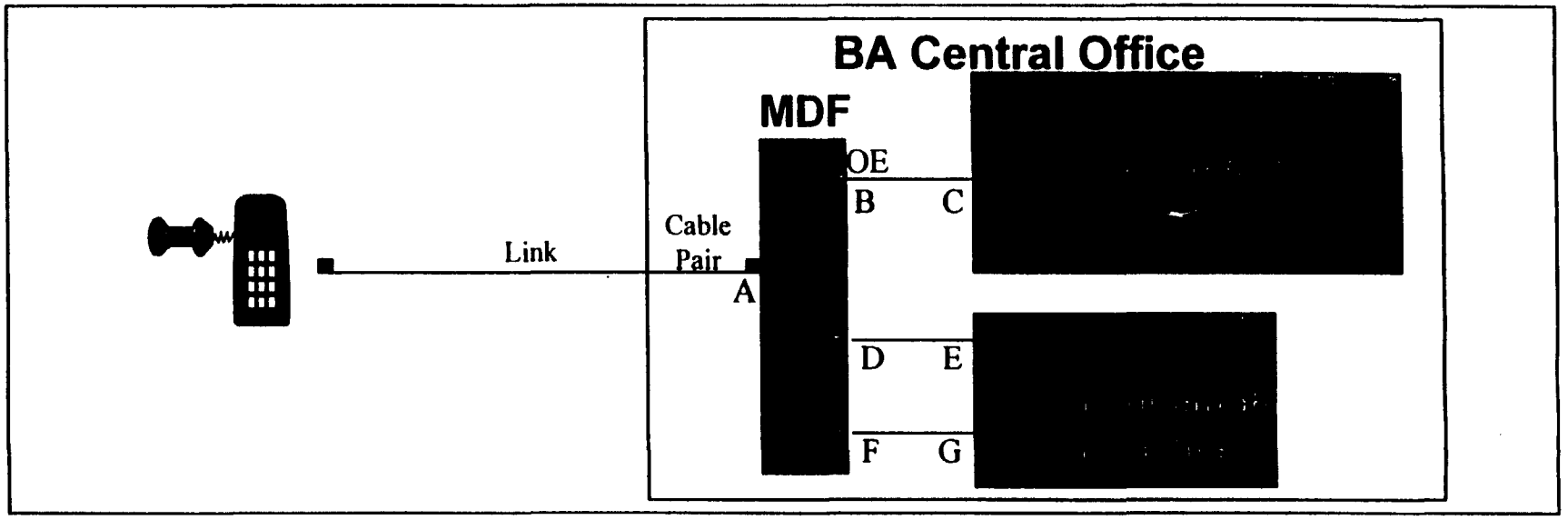
By the Commission,

(SIGNED) ROBERT A. SIMPSON
Assistant Secretary

APPENDIX A

Bell Atlantic

Conversion of existing BA-NY end user to UNEs



1) CLEC cross-connects for loop (F-G) and port (D-E) tie cables, are pre-wired in collocation arrangement.
2) BA receives one LSR including Loop and Port tie cable assignment information.

Date Due Minus Two (days)

1) BA frame technician confirms correct telephone number is on loop at (A).
2) BA frame technician lays in loop cross-connect (A-F) "dead ended" at MDF (A).
3) BA frame technician runs port cross-connect (B-D). Dial-tone is now bridged through CLEC collocation arrangement.

Date Due (Cutover)

1) BA cutover coordinator contacts frame (MDF) and RCMAC (line translations) technicians.
2) BA frame technician re-verifies correct telephone number is on loop at (A).
3A) BA RCMAC technician activates unbundled port line translations.
3B) BA frame technician lifts A-B connection at (A), and places cross-connect (A-F) at (A). Cutover is complete.
4) BA frame technician removes A-B cross connect.

APPENDIX B

DIRECT CONNECTION BETWEEN CLECS VIA CABLE SUPPORT BETWEEN CAGES

DEDICATED CABLE SUPPORT (DCS)

Currently, Bell Atlantic has filed in the NY PSC 914 the ability for CLECs to directly connect to each other by means of their own dedicated cable support as follows:

Bell Atlantic will permit two or more CLECs that are physically collocated within the same common area in the central office to provision upon request, the cabling and racking necessary to interconnect subject to the following regulations:

1. CLECs must establish a physical collocation arrangement. CLEC collocated equipment must be used for interconnection with Bell Atlantic or access to Bell Atlantic unbundled network elements.

1. The CLEC is responsible for the installation and maintenance of all cabling and connections between the collocation arrangements. The CLEC is responsible for contracting directly with a Bell Atlantic approved vendor. The vendor used to provision DCS must be on Bell Atlantic's list of approved vendors. A CLEC may request that a qualified vendor be added to Bell Atlantic's list pending approval.

1. DCS may be provided to support VG/DS0, DS1, DS3 and fiber optic cables. Fiber jumpers will be permitted, as approved by Bell Atlantic on a temporary basis, subject to removal within 60 days of installation.

1. Fiber splicing within DCS will be considered on a case by case basis subject to approval by Bell Atlantic.

1. DCS may be shared by multiple CLECs. Subsequent requests for DCS by other CLECs may connect to the common DCS structure. The CLECs must be located within the same physical collocation common area in the central office, and the connecting transmission facilities must not be placed outside this common area.

1. The CLEC must adhere to Bell Atlantic practices and safety requirements for central office cabling (GR-409-CORE and National Electrical Code) as they relate to fire, safety, health and environmental safeguards.

1. The provisioning of DCS will be under the direct supervision of Bell Atlantic and must meet Bell Atlantic's specifications. Bell Atlantic will designate locations for placement of DCS based upon space availability and where technically feasible.

1. DCS will be available pursuant to space availability within the Physical

equipment of all parties must be used for interconnection with Bell Atlantic or access to Bell Atlantic unbundled network elements.

1. CLECs wishing to directly connect must be located within the same physical collocation common area in the central office, and the connecting transmission facilities must not be placed outside this common area. The common racking to be used must be the most efficient route between physical collocation arrangements within the same common room.

1. The CLEC must request such connections through a collocation application submitted to Bell Atlantic Collocation Project Manager to request utilizing common racking in the common physical collocation area.

1. Prior to beginning any delivery, installation, replacement, or removal work for cabling between collocation arrangements, the CLEC must obtain Bell Atlantic's written approval of the CLEC's proposal scheduling the work. Methods of procedures (MOP) will be mutually agreed to and signed by the participating CLECs and Bell Atlantic. CLECs may not run cable using common racking without BA approval.

1. Bell Atlantic practices call for the segregation of cable racks by type, i.e. power, electrical cable, fiber optic cable. When using Bell Atlantic racks, CLECs must adhere to this practice by using the common racking only when the cabling for interconnection between cages coincides with that which the racking has been designated to support.

1. Fiber optic cables may not be placed on cable racks supporting electrical transmission cables (e.g., VG/DS0, DS1, DS3).

1. Collocation dispute resolution procedures will apply as situations warrant as set forth in NY PSC 914, section 5.5.7.

1. Bell Atlantic will survey the common area to determine whether or not the existing common racking will meet the needs of the CLEC request.

1. The CLEC is responsible for the installation and maintenance of all cabling and connections between the collocation arrangements.

1. All fiber splicing must be done within the cage enclosure or CLEC equipment bay. There will be no fiber splicing or placement of splitters on common racks.

1. The CLEC must adhere to Bell Atlantic practices and safety requirements for central office cabling (GR-409-CORE and National Electrical Code) as they relate to fire, safety, health and environmental safeguards.

1. All CLECs must clearly label their cabling making sure to indicate the number of feet being run between cages. (Applies to cable run on common racking only.)

APPENDIX C

SPECTRUM MANAGEMENT REQUIREMENTS FOR COMPANIES SHARING COMMON CABLE RACKS IN ILEC CENTRAL OFFICES

Spectrum management is the process that is used to assure that communication signals are not interfered with by other signals to such an extent that signal quality is degraded beyond an acceptable level. There are at least two parties to interference-the party causing the interference (interferer) and the party affected by the interference. The following requirements are designed to prevent interference with signals on cables bearing in-service telecommunications traffic.

- Each CLEC requesting use of ILEC central office common cable racks for the placement of communications cable(s) to interconnect communications equipment shall be responsible for informing the ILEC of the type and power level of the signals that will be carried by the cable(s).

- The ILEC will determine the type of cable necessary to prevent interference from the CLEC signals and notify the CLEC. The CLEC will be required to use the specified type of cable and will so certify to the ILEC.

- If, as the result of a CLEC introducing signals different than as originally specified, interference is caused with other common cable rack users, the CLEC causing the interference shall <u>immediately</u> cure the interference problem by ceasing transmission of the interfering signals.

APPENDIX D

APPENDIX

List of Security Arrangements

1. All equipment racks and associated equipment must be contained within NEBS complaint cabinets/lockers. Cabinet/locker must restrict access to both the front and back of equipment.

2. Collocator's name must be clearly identified in large block letters on both the front and the back of the equipment cabinet/locker.

3. Collocator will uniquely outline footprint associated with their equipment with color-coded floor tape.

4. Entry and exit from the SCOPE area will be electronically or manually logged as supported by Bell Atlantic-New York central office entrance procedures.

5. Collocators reserve the right (individually or collectively) to install and maintain video surveillance equipment within the common area in accordance with procedures jointly established with Bell Atlantic-New York.

6. Collocator will maintain bonding, insurance and indemnification similar to that Bell Atlantic-New York requires for installation vendors.

7. Collocator's employees responsible for provisioning, maintenance and repair will attend necessary and relevant Bell Atlantic-New York training sessions with regard to workplace safety and security procedures. The timing and charges for this training will be mutually agreed to by the Collocator and Bell Atlantic-New York.

8. Collocator shall insure that employees are trained to minimize safety hazards and safely operate the equipment associated with the work tasks being performed, and provide or require employees to have personal protective equipment necessary to safely perform the work tasks.

9. Collocator will provide and maintain an up-to-date list of employees that will require access to collocated equipment for provisioning, maintenance and repair services.

Scope Access Log
_____ Central Office

DATE	ENTRY TIME	EXIT TIME	NAME (PRINT)	VENDOR	COLLOCATOR(S)	PLND OR EMERG

APPENDIX E

Collocation with Escort (CWE)

General Proposal: Under Collocation with Escort (CWE), the CLEC would be allowed to place equipment in BA-NY CO space without the construction of a cage. CLEC equipment will be installed in a separate CWE area, as designated by Bell Atlantic. This space will be in a separate lineup typically a minimum of ten (10) feet from working Bell Atlantic equipment. The equipment location will vary based on individual central office configurations. To the extent that environmental conditioning is required to support the equipment, these costs will be charged to the CLEC consistent with the relevant provisions of a to-be-filed and approved revised Virtual Collocation tariff. The CLEC equipment will not share the same equipment bays with BA-NY equipment. BA-NY central office space is to be used for the installation of CLEC provided transmission equipment. CWE is to be used exclusively for access to BA-NY UNEs. BA-NY approved equipment installation vendors (hired by the CLEC) will install the CLEC's equipment according to the regulations in place that apply to virtual collocation. CLEC designated and hired personnel will gain access to the CLEC's equipment for provisioning, maintenance, and repair under continuous escort by BA-NY central office technicians. (As with existing forms of physical and virtual collocation, distributing frames are BA-NY equipment and may not be worked on by the CLEC vendors under this arrangement). At the time CWE is ordered, the requesting CLEC will be placed in queue for physical collocation at that central office. CWE will be provided under the current virtual collocation interval.

Availability of Collocation with Escort option:
This option is available to a requesting CLEC in central offices where either:

I. BA-NY cannot satisfy a request for collocation of a 25 square foot cage or SCOPE, either through available CO space or through recovering unused collocation space; or
II. BA-NY has not previously provided at least 200 square feet of physical collocation space.

\I) Migration of CWE option when collocation space becomes available.

-When space suitable for physical collocation becomes available, no further CWE bays/cabinets may be added. Additional shelves may be added to fill existing bays/cabintes. At its expense, the CLEC has the option to migrate to the newly available collocation space accordingly to the CWE CLEC's place in the collocation space queue.

-At any time, a CWE installation can be converted to virtual collocation at the request of the CLEC.

Ownership of equipment: CLEC would own the CWE equipment. All standard

physical collocation requirements (e.g., NEBS compliant) apply.

Installation of equipment: Equipment will be installed according to the current rules that govern the third party installation of virtual collocation equipment. BA-NY safe time work practices and central office equipment installation practices and policies will be followed.

Provisioning, Maintenance and Repair of Equipment: Provisioning, maintenance, and repair of the equipment will be accomplished through CLEC designated personnel. These are activities that take place immediately in front of or behind the bays/cabinets of CLEC equipment. BA-NY requires that the CLEC-designated personnel be bonded and adhere to safe work practices. BA-NY reserves the right to deny access to CLEC personnel or vendors that do not adhere to safe work practices.

Unless necessary to protect BA-NY equipment and services, under no circumstances will BA-NY technicians work on the CWE equipment (even where requested to do so by the CLEC).

Escort Service for CLEC-Designated Personnel: For provisioning, maintenance and on-demand repair activities by CLEC designated personnel, the work will be performed under the continuous escort of a BA-NY CO technician. The BA-NY CO technician will have the authority to tell the CLEC designated personnel to stop working when the BA-NY CO Technician determines that the work is being performed in a manner that will cause harm to BA or other CLEC services. An escalation process will be established to resolve disputes.

Requests for access for equipment installation activities will be scheduled at the BA-CLEC-installation vendor Method of Procedure (MOP) meeting for each job. Requests for access for routine maintenance activities will be scheduled with BA-NY 72 hours* in advance. Requests for access for provisioning activities will be scheduled with BA-NY 48 hours* in advance. Access for on-demand repair activities will be provided by BA-NY consistent with the prioritization BA-NY uses for its own equipment and services (see the following). CLEC escort requests will include details of the magnitude of the outage. When multiple troubles of the same magnitude are encountered at the same location, they will be prioritized in order of trouble report received.

Compensation: BA-NY's preliminary view is that charges will be modeled after the charges identified for virtual collocation including a charge for CO office space. There will be two separate hourly charges for the escort service: the first charge will apply for on-demand repair escorts; the second charge will apply for scheduled escorts. These hourly charges will be equivalent to the loaded hourly labor rate of BA-NY CO

technicians. Travel time for the escort (to and from the central office) will be charged when incurred. If an emergency callout is required, the CLEC will pay for BA-NY's contract commitment of (minimum) paid hours. A premium rate will apply for weekend, and out-of-hours, and overtime escorts.

* Requests must be made during normal business hours (i.e., 8 - 5 M-F) Saturdays and Sundays are not included in the calculation of elapsed time.

Preliminary List of Escort Service Related Issues

(i) further analysis of shared craft escort resources is required; (ii) estimation of load and force requirements will be handled on a case by case basis subject to normal escalation procedures; (iii) effects of appointments that run longer than scheduled with the result that other appointments for the escort might be missed will be handled on a case by case basis subject to normal escalation procedures.

Prioritization of Repair

Circuit Level outages (within each category handled on a first come first served basis)

1. TSP (Telecommunication Service Priority)
   Certification requested from the FCC by end user

2. Hi Cap Services - DS3 and DS1

3. DDS Services

4. Analog Services

System Outages (e.g., fiber optic terminals, multiplexers, switches, signaling network components, electronic cost connects, etc.)

1. FCC Reportable
   a) Greater than 30,000 lines for more than 30 minutes
   b) Greater than 25 DS3ss for more than 30 minutes

1A 911/E911

2. Everything else

Priority based on estimated number of affected customers, as determined by local management.